University of Baltimore Law
ScholarWorks@University of Baltimore School of Law

All Faculty Scholarship | Faculty Scholarship

Spring 2001

Rewriting Near v. Minnesota: Creating a Complete Definition of Prior Restraint

Michael I. Meyerson
University of Baltimore School of Law, mmeyerson@ubalt.edu

Follow this and additional works at: http://scholarworks.law.ubalt.edu/all_fac

 Part of the Communications Law Commons, and the First Amendment Commons

Recommended Citation
Rewriting Near v. Minnesota: Creating a Complete Definition of Prior Restraint, 52 Mercer L. Rev. 1087 (2001)

This Article is brought to you for free and open access by the Faculty Scholarship at ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

Rewriting *Near v. Minnesota:* Creating a Complete Definition of Prior Restraint

by Michael I. Meyerson*

The Supreme Court's opinion in *Near v. Minnesota*[1] was both a major step on the road to free expression and a missed opportunity. It represented the first time a law was struck down as violating the First Amendment's guarantee of free expression. Moreover, it placed the concept of "prior restraint" at the forefront of the theory of free expression. As one scholar noted: "Since the 1931 release of the Supreme Court's opinion in *Near v. Minnesota*, the doctrine of prior restraint has been an essential element of first amendment jurisprudence."[2]

Unfortunately, the Court neither defined prior restraint, nor explained precisely why injunctions fit within a definition of prior restraint. Equally regrettable, the Court listed, without explanation, four exceptions to the prior restraint doctrine, a list that was both over- and under-inclusive.[3]

The lack of a generally accepted definition, plus the unprincipled gaps created by the exceptions, has led to a situation in which the prior restraint doctrine is increasingly derided by legal scholars and frequent-

---

* Professor of Law, Piper & Marbury Faculty Fellow, University of Baltimore School of Law. Hampshire College (B.A., 1976); University of Pennsylvania (J.D., 1979). Support for this Article was provided by the University of Baltimore School of Law Summer Research Stipend. I would like to thank Eric Easton and Dan Brenner for their comments and suggestions. Further, I wish to thank Emily Greenberg, Elizabeth Rhodes, and the rest of the University of Baltimore School of Law Library Staff for their invaluable assistance.

1. 283 U.S. 697 (1931).

2. Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 2 (1989).

3. 283 U.S. at 716.

ly misunderstood by the Court itself. Many respected commentators have concluded that the concept of prior restraints marks a "distinction without a difference."[4] The prior restraint doctrine has been termed, "so far removed from its historic function, so variously invoked and discrepantly applied, and so often deflective of sound understanding, that it no longer warrants use as an independent category of First Amendment analysis."[5]

One reason for the strong antipathy some feel for the prior restraint doctrine is that it seems to justify the imposition of subsequent punishments on speech. Ever since Blackstone and the Sedition Act of 1798,[6] the heavy hand of censorship was defended on the basis that no "previous restraint" was involved.[7] Because the prior restraint doctrine is not a substantive protection, it "leaves open the possibility that this same speech-suppressive activity might be found constitutional if sufficiently redesigned and recast in the form of a subsequent sanction."[8]

---

4. Scordato, *supra* note 2, at 1.

5. John Calvin Jeffries, *Rethinking Prior Restraint*, 92 YALE L.J. 409, 437 (1983); *see also* Note, *Prior Restraint—A Test of Invalidity in Free Speech Cases?* 49 COLUM. L. REV. 1001, 1006 (1949) (stating that "[w]hatever the value of the prior restraint doctrine in the past, it has outlived its usefulness"). Not all commentators are ready to give up on the prior restraint doctrine. *See, e.g.*, Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11 (1981); Howard Hunter, *Toward a Better Understanding of the Prior Restraint Doctrine: A Reply to Professor Mayton*, 7 CORNELL L. REV. 283, 293-95 (1982).

6. Act of July 14, 1798, ch. 71, 1 Stat. 596 (1798) (expired 1801).

7. *See infra* text accompanying notes 30 & 33.

8. Martin Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 54 (1984); *see also* William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 253 (1982) (arguing that "subsequent punishment is a means of 'prevention' of speech something akin to a previous restraint"); Hans A. Linde, *Courts and Censorship*, 66 MINN. L. REV. 171, 185-86 (1981) (stating that subsequent punishment is prior restraint for all practical purposes because "[i]ts object is to prevent publication, not to impose punishment"); Thomas R. Litwack, *The Doctrine of Prior Restraint*, 12 HARV. C.R.-C.L. L. REV. 519, 521 (1977) (stating that "the threat of criminal and civil penalties can inhibit arguably protected expression from reaching the public just as effectively as injunctions or licensing schemes").

A related argument is that the prior restraint doctrine injures free expression because it encourages subsequent punishments, which are more harmful than injunctions. Professor Scordato argued:

> uniform, impersonal threats, while they may have less of a deterrent effect on any given individual, will have some influence on every individual in the regulated community. On the other hand, specific, personal threats, while perhaps more potent with respect to each targeted individual, are limited in their scope, by definition, to one, or at the most to a very few, such individuals. The overall

Such criticism is short-sighted. Unless we inhabit a legal universe where all speech is protected, the doctrine of prior restraint is essential for the protection of free speech. As soon as it is conceded that some speech might be punished, procedural protection becomes essential. With its distinguished historical pedigree, the prior restraint doctrine helps to preserve the murky line between protected and unprotected speech. The most vigorous defense of protected speech is aided by the secondary shield of the prior restraint doctrine. Moreover, the doctrine serves to restrain the overuse of arguably permissible censorship by biased, overly eager, or insensitive government officials.

But this protection is possible only if a critical problem is solved: the lack of a legal definition of the term "prior restraint." Many share the frustration of Professor Harry Kalven who bemoaned in 1971, "it is not altogether clear just what a prior restraint is or just what is the matter with it."[9]

In his classic 1955 study of prior restraint, Professor Thomas Emerson wrote that "despite an ancient and celebrated history, the doctrine of prior restraint remains today curiously confused and unformed."[10] Amazingly, that situation remains today. The result has been the purpose for the prior restraint doctrine has been obscured, a consistent and predictable application of the doctrine has been impossible, and the utility of the doctrine has been diminished.

Without a definition, prior restraint has frequently degenerated into nothing more than a "category label."[11] It can become almost a game for attorneys defending speakers to affix the label of prior restraint on

---

societal impact of such specific, personal threats, given the large number of individuals in society, is quite small indeed.

Scordato, *supra* note 2, at 14; *see also* Mayton, *supra* note 8, at 246 (stating that "the preference for subsequent punishment over injunctive relief diminishes the exercise of free speech by burdening it with costs that seem not yet comprehended").

This is an intriguing argument, but it relies on the mathematically unresolvable question of whether a weak threat to many impacts speech more than a strong threat to a few. One problem is the extent of the different threats are unquantifiable, so comparison of total harm is impossible. Recognizing both prior restraints and subsequent punishment are harmful to free expression, I prefer to oppose them both, and, if truly forced to choose, prefer the security of the historically based doctrine of prior restraints.

9. Harry Kalven, *The Supreme Court 1970 Term—Foreword: Even When a Nation Is at War,* 85 HARV. L. REV. 3, 32 (1971).

10. Thomas Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 649 (1955); *see also* Jeffries, *supra* note 5, at 420 (stating that "[t]he lack of settled content in the term 'prior restraint' is, by now, painfully obvious").

11. Scordato, *supra* note 2, at 30.

whatever law is being challenged.[12] Often, the game can be successful. As Professor Laurence Tribe has noted, the Supreme Court "has often used the cry of 'prior restraint' not as an independent analytical framework but rather to signal conclusions that it has reached on other grounds."[13]

In this Article, I will attempt to complete the unfinished task of *Near*—the creation of a comprehensive definition of prior restraint and a reasoned explanation of the exceptions. The heart of this new definition comes from the realization that, at its core, the doctrine of prior restraint embodies not only principles of free speech, but of separation of powers as well. While the dangers from a prior restraint are the same regardless of the branch from which it emanates, the method for preventing this harm will be different by necessity. Thus, when regulating speech, each branch of government is restricted in terms of timing in regard both to the communication itself and to the actions of the other branches of government.

Separation of powers has always been a critical, if indirect, mechanism for preserving individual liberty. As Justice Kennedy remarked, "Liberty is always at stake when one or more branches seek to transgress the separation of powers."[14] Nowhere is that more true than in the doctrine of prior restraint.

The inclusion of principles of separation of powers permits, for the first time, the creation of a workable definition of prior restraint. Once this definition has been given, two facts become clear. First, the doctrine of prior restraint can be easily and consistently applied to a wide range of speech-related issues. Second, preservation of the prior restraint doctrine is critically important for the protection of free expression.

I. A *NEAR*-GREAT DECISION

In *Near* the Supreme Court ruled a Minnesota law that permitted the government to obtain a court order abating defamatory newspapers as a "nuisance" created an unconstitutional prior restraint.[15] The opinion,

---

12. First Amendment expert Floyd Abrams once told a symposium that "he was very tempted as an advocate, to characterize anything having the vaguest semblance to a prior restraint as a prior restraint, since prior restraints are somewhat of a taboo." Donald Gilmore, *Prologue (for "*Near v. Minnesota *50th Anniversary Symposium")*, 66 MINN. L. REV. 1, 8 (1981).

13. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988), §§ 12-34, at 1040; *see also* Jeffries, *supra* note 5, at 413 (referring to the "latent plasticities" of the prior restraint doctrine).

14. Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

15. 283 U.S. at 706. The state obtained an injunction from a state court barring The Saturday Press from publishing or distributing "any publication whatsoever which is a

written by Chief Justice Hughes, declared "it has been generally, if not universally, considered that it is the chief purpose of the guaranty [of liberty of the press] to prevent previous restraints upon publication."[16] Instead of defining what made a particular regulatory scheme a prior restraint, the Court focused on the statute's "operation and effect."[17] Noting the "object and effect" of the statute was to "suppress" future publication, the Court described the operation of the statute as putting "the publisher under an effective censorship."[18]

According to the Court, the primary offending feature of the statute was that upon a finding that a publisher had distributed a "malicious, scandalous or defamatory" newspaper, the "resumption of publication [was] punishable as a contempt of court by fine or imprisonment."[19] The Court's injunction "would lay a permanent restraint upon the publisher, to escape which he must satisfy the court as to the character of a new publication."[20] Whether future publications would be free from punishment would depend upon whether the publisher was able "to satisfy the judge that the charges are true and are published with good motives and for justifiable ends."[21] This, explained the Court, "is of the essence of censorship."[22]

The Court stated, though, that the constitutional ban on prior restraint was not "absolutely unlimited" but was subject to limitation "only in exceptional cases."[23] The Court listed four such cases:[24] 1) "actual obstruction to [the Government's] recruiting service or the publication of the sailing dates of transports or the number and location of troops;"[25] 2) "the primary requirements of decency . . . against

---

malicious, scandalous or defamatory newspaper, as defined by law." *Id.* That court noted The Saturday Press was not barred from all publishing; it was still permitted to operate "a newspaper in harmony with the public welfare to which all must yield." *Id.* For the classic description of The Saturday Press and the *Near* case, see FRED W. FRIENDLY, MINNESOTA RAG: THE DRAMATIC STORY OF THE LANDMARK SUPREME COURT CASE THAT GAVE NEW MEANING TO FREEDOM OF PRESS N.Y.: Random House (1981).

16. 283 U.S. at 713. For its description of "the conception of the liberty of the press as historically conceived and guaranteed," the Court cited both Blackstone and DeLolme. *Id.* at 713-14.

17. *Id.* at 708.

18. *Id.* at 712.

19. *Id.*

20. *Id.*

21. *Id.* at 713.

22. *Id.*

23. *Id.* at 716.

24. *Id.*

25. *Id.* These were the paradigms for permissible war-time prior restraints: "When a nation is at war many things that might be said in time of peace are such a hindrance

obscene publications;"[26] 3) "incitements to acts of violence and the overthrow by force of orderly government . . . words that may have all the effect of force;"[27] and 4) "[protection of] private rights according to the principles governing the exercise of the jurisdiction of courts of equity."[28]

The Court added an additional exception, stating the ban on private restraints would not prevent a court, in a proper case, from using its traditional contempt powers over those who interfere directly with the operation of the court: "There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions."[29]

The primary weakness in the *Near* decision comes from its failure to define precisely what will constitute a prior restraint. There is no overarching principle to help evaluate future complicated regulatory attempts. Moreover, the listed exceptions appear nothing more than an ad hoc enumeration rather than part of a reasoned doctrine.

II. SEPARATION OF POWERS AND THE DEFINITION OF PRIOR RESTRAINT

The most famous eighteenth-century discussion of prior restraint, Sir William Blackstone's *Commentaries on the Laws of England*,[30] also does not provide a definition of that which it condemns. Rather, Blackstone announced the distinction between "prior restraints" and "subsequent punishment" and explained that subsequent punishment for libels is consistent with his view of liberty of the press:

> The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.[31]

---

to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." *Id.* at 716 (quoting Schenck v. United States, 249 U.S. 47, 52 (1919)).

26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 715.
30. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1769).
31. *Id.* at 151-52.

While this statement does indicate the general English opposition to previous restraints, it does not actually say what constitutes such a restraint. Blackstone merely contrasts previous restraints with punishments that are imposed after someone "publishes what is improper, mischievous, or illegal."[32] Later in this same section, he discusses the press licensing of the previous century, but instead of describing the full array of impermissible previous restraints, he simply contrasts such licensing with the concept of subsequent punishment.[33]

Thus, Blackstone never directly addresses the extent to which judicial orders should or should not be viewed as previous restraints. Significantly, his description of the remedy for a libel pointedly omits any reference to injunctive relief: "The punishment of such libellers, for either making, repeating, printing, or publishing the libel, is fine, and such corporal punishment as the court in their discretion shall inflict; regarding the quantity of the offense, and the quality of the offender."[34]

The lesson from Blackstone, then, is merely that previous restraints, such as licensing, violate liberty of the press. It is necessary to turn elsewhere for a fuller description of what was encompassed by the term "previous restraint."

In his classic nineteenth-century treatise on constitutional law, Justice Joseph Story described liberty of the press in the following way: "[N]either the courts of justice, nor other persons, are authorized to take notice of writings intended for the press; but are confined to those, which are printed."[35] This description accurately captures the reality [and the framers' understanding] that the dangers of prior restraints can come from either judges or licensors.[36] The description is not complete,

---

32. *Id.* at 152.

33. Blackstone wrote:

> To subject the press to the restrictive power of the censor, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order. . . .

Id. at 153.

34. *Id.* at 151.

35. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1879 (1833). This description is essentially the same as DeLolme gave of the English view of liberty of the press in 1775. JAMES DELOLME, THE CONSTITUTION OF ENGLAND 254 (John MacGregor, ed., 1853) (1775).

36. *See* Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 IND. L. REV. 1 (2001).

though, because it leaves out the component so many others have missed. The description overlooks the difference between restraints emanating from "the courts of justice" and those emanating from "other persons."[37] Specifically, the description omits the fundamental differences between restraints emanating from the judicial, as opposed to the executive, branch of government.

The critical element of finally solving the puzzle of defining prior restraint is the recognition that the *same* constitutional harm will necessitate *different* safeguards, depending on which branch of government is inflicting the injury. Both the executive branch, through the discretionary granting of permits or the creation of licensing boards, and the judicial branch, through injunction, can create the evil of prior restraint. But in a system of government in which the judiciary is supreme, the methods for preventing executive encroachment on freedom are different from those for preventing judicial encroachment. In particular, one of the primary ways to prevent executive over-reaching is with judicial review. However, the fundamental protection against judicial over-reaching in our constitutional system is structural. Judicial action is limited to a specified role at a specified time in any particular case. The court does not resolve disputes that it institutes itself but only those brought by either the executive branch or private parties.[38]

The concept of prior restraint, thus, has two distinct components: one temporal, the other embodying the principle of separation of powers. This is not the separation of powers principle at stake in the *Pentagon Papers* case involving congressional authorization of presidential activity.[39] Rather, this is the literal separating of power described in *The Federalist Papers*:

> "When the legislative and executive powers are united in the same person or body," says [Montesquieu], "there can be no liberty, because apprehensions may arise lest THE SAME monarch or senate should ENACT tyrannical laws to EXECUTE them in a tyrannical manner."

---

37. *Id.*

38. According to Alexander Hamilton, the judicial branch, "can take no active resolution whatever." THE FEDERALIST NO. 78 (Alexander Hamilton). As Justice Scalia has noted, the Judicial Branch is "powerless to act except as invited by someone other than itself." Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 393 (1997) (Scalia, J., dissenting); *see also* Baker v. McCollan, 443 U.S. 137, 145 (1979) (stating that liberty is protected by "[a] reasonable division of functions between law enforcement officers, committing magistrates, and judicial officers").

39. New York Times Co. v. United States, 403 U.S. 713, 742 (1971) (Marshall, J., concurring) (stating, "It would, however, be utterly inconsistent with the concept of separation of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit.").

> Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for THE JUDGE would then be THE LEGISLATOR. Were it joined to the executive power, THE JUDGE might behave with all the violence of AN OPPRESSOR."[40]

Each branch has a specifically delineated, independent role before punishment is inflicted. Each branch's role is easier to understand by starting with a picture of a permissible *subsequent punishment.* This in no way contradicts the reality that in a free society, most restrictions on speech, whether prior restraint or subsequent punishment, are unconstitutional. But, as the doctrine of prior restraint presupposes a sphere of permissible subsequent punishment, visualizing the distinction is essential.[41] In those rare cases in which a subsequent punishment is permitted at all, it must follow the traditional time-line:[42] First, the legislature enacts a general law defining the prohibited speech or conduct. For states, this could also be a common-law prohibition.[43] Second, the speech is communicated. Third, the executive branch enforces the law by initiating legal proceedings, arresting the alleged law breaker, or filing a complaint in court. For a private action, such as libel or invasion of privacy, the individual who is alleging harm institutes the legal proceedings. Finally, the judicial branch rules on the legality of the communication. This includes jury determinations of guilt, fault for libel, and community standards for obscenity. Upon a finding of illegality, the punishment is prison or fine for a criminal offense and damages for a civil violation.[44]

Fundamentally, therefore, the only governmental activity relating to speech permitted "prior" to communication is that of the legislature creating a general rule.[45] Such a rule, subject to the substantive limits of the First Amendment, could penalize such areas as defamation, obscenity, and breaches of the peace. There is no role for either the executive branch or the judicial branch at the creation of a general rule; both are barred from taking action on expression before communication.

---

40. THE FEDERALIST NO. 47, at 303 (James Madison) (Mentor Book 1961).

41. *See, e.g.*, Alexander v. United States, 509 U.S. 544, 550 (1993), referring to "the distinction, solidly grounded in our cases, between prior restraints and subsequent punishments."

42. *See generally*, INS v. Chadha, 462 U.S. 919 (1983).

43. In 1812 the U.S. Supreme Court ruled that there was no common-law jurisdiction in the federal courts. United States v. Hudson & Goodwin, 11 U.S. 32, 34 (1812).

44. *See* Meyerson, *supra* note 36.

45. Obviously, the general rule must precede the communication. If a general rule was applied to communication that had already occurred, it would be an unconstitutional *ex post facto* law.

Once expression is communicated, the legislature, of course, has no further role. The next governmental actor is the executive branch; police may arrest and prosecutors or government attorneys may file complaints. In the case of private causes of action, such as defamation, private citizens may initiate law suits.

Finally, in response to these filings, the courts decide the case. With the jury making the appropriate decisions, the courts rule directly on whether the expression is constitutionally protected and whether it violated the law.

With this structure in mind, a two-part definition for prior restraint can be articulated: (1) A prior restraint occurs whenever judges or executive branch personnel are authorized to take notice of specific expression intended for communication rather than that which has actually been communicated. (2) For those rare cases when the Constitution permits the regulation of expression before it is communicated, a prior restraint also occurs if either (a) the judiciary can initiate enforcement or delimit the speech that is prohibited; or (b) the executive can make a final determination of illegality.

To summarize, the doctrine of prior restraint restricts the ability of all three branches of government to regulate expression. Each branch is prohibited from either (a) restricting specific speech or speakers prior to communication or (b) formulating or implementing rules on speech other than in that branch's appropriate constitutional chronological order.

The vast majority of Supreme Court cases dealing with prior restraint fit comfortably within this definition.[46] The Supreme Court has repeatedly struck down prior restraints emanating from the judicial branch, in the form of injunctions, and the executive branch, in the form of either a grant of unlimited discretion or the lack of adequate procedures for determining what speech is unprotected by the Constitution.

A. Injunctions as a Prior Restraint

In several cases following *Near*, the Supreme Court struck down injunctions against speakers as unconstitutional prior restraints. While these cases do not define prior restraint, they seemed to proceed on the assumption that whatever a prior restraint was, the particular injunction involved belonged in that category.

---

46. There have been a few notable exceptions when the Court has misunderstood and misinterpreted the prior restraint doctrine. For the major cases that fall outside this definition, see *infra* text accompanying notes 71-80.

In 1971, the Supreme Court denied a government request for an injunction against the publication of the Pentagon Papers by the *New York Times* and *The Washington Post*.[47] While each Justice wrote a separate opinion, the brief *per curiam* opinion for the Court focused entirely on the issue of prior restraint.[48] Quoting earlier cases, the Court stated that there is a "heavy presumption against" the constitutional validity of any system of prior restraint and that the government, therefore, has "a heavy burden of showing justification for the imposition of such a restraint."[49]

No opinion spoke for a majority as to precisely why the "heavy burden" was not met. The view that probably comes closest to a majority analysis came from Justice Stewart's concurring opinion, stating a prior restraint was impermissible if disclosure would not "surely result in direct, immediate, and irreparable damage to our Nation or its people."[50] Because the government could establish only a possibility of harm, the injunction was denied.[51] As Justice Brennan wrote, "the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result."[52]

The next major Supreme Court case on injunctions as prior restraints occurred in the 1976 case of *Nebraska Press Ass'n v. Stuart*.[53] A state trial judge, in a widely reported murder trial, entered an order prohibiting the publishing or broadcasting of "confessions or . . . facts strongly implicative of the accused."[54] In striking down this order, the Court declared that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment

---

47. New York Times Co. v. United States, 403 U.S. 713, 714 (1971). The "Pentagon Papers" were a history of America's involvement in the Vietnam conflict.

48. *Id.*

49. *Id.* at 714 (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) and Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)).

50. *Id.* at 730 (Stewart, J., concurring). Justice White joined this opinion, and Justice Brennan's concurrence used almost precisely the same language: "[O]nly governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order." *Id.* at 726-27 (Brennan, J., concurring). Justice Black, in an opinion joined by Justice Douglas, wrote, "I agree completely that we must affirm the judgment of the Court of Appeals for the District of Columbia . . . Circuit Court of Appeals . . . for the reasons stated by my Brothers Douglas and Brennan." *Id.* at 715 (Black, J., concurring).

51. *Id.* at 714.

52. *Id.* at 725-26 (Brennan, J., concurring).

53. 427 U.S. 539 (1976).

54. *Id.* at 541.

rights."[55] The Court did not say, however, that a prior restraint could never be issued to protect a fair trial against adverse publicity.[56] Trial judges would be permitted to order such a restraint only if (1) there was extensive pretrial news coverage; (2) the restraining order would actually be effective; and, most significantly, (3) no other measures could mitigate the effects of the pretrial publicity.[57]

The Court did announce one absolute bar to prior restraint.[58] The Court declared that the press could never be restrained from publishing information revealed in open court: "[O]nce a public hearing had been held, what transpired there could not be subject to prior restraint."[59]

The 1990 case of *United States v. Noriega*[60] signaled a potentially serious erosion of the protection against prior restraint. Although the Supreme Court merely denied certiorari, *Noriega* is significant both because of the error made by the lower courts and because the Supreme Court permitted a prior restraint to continue.[61]

---

55. *Id.* at 559.

56. *Id.* at 569-70.

> However difficult it may be, we need not rule out the possibility of showing the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraint. This Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed.

Id.

57. *Id.* at 562. Among the alternate measures given were (a) change of venue; (b) postponement; (c) voir dire of prospective jurors; (d) "emphatic and clear" jury instructions; and (5) sequestration of jurors. *Id.* at 563-64. The Court also referred to proposals to limit what attorneys and witnesses can say about a pending trial but specifically declined to discuss the constitutionality of such a limit. *Id.* at 564. The Court stated, "At oral argument petitioners' counsel asserted that judicially imposed restraints on lawyers and others would be subject to challenge as interfering with press rights to news sources . . . . We are not now confronted with such issues." *Id.* at 564 n.8.

58. *Id.* at 568.

59. *Id.*; *see also* Oklahoma Publ'g Co. v. District Court, 430 U.S. 308, 310 (1977) (stating that "the First and Fourteenth Amendments will not permit a state court to prohibit the publication of widely disseminated information obtained at court proceedings which were in fact open to the public").

60. 917 F.2d 1543 (11th Cir. 1990), *cert. den. sub nom.* CNN, Inc. v. Noriega, 498 U.S. 976 (1990). Judge Hoeveler explained his reason for originally issuing the injunction in his decision that ended the restraint. United States v. Noriega, 752 F. Supp. 1045, 1049 (S.D. Fla. 1990). CNN was found in criminal contempt in 1994. United States v. CNN, 865 F. Supp. 1549, 1564 (S.D. Fla. 1994).

61. An example of this harm can be seen in the extraordinary decision of the South Carolina Supreme Court upholding a court order banning broadcast of a videotaped conversation between a criminal defendant and his attorney on the grounds that it was necessary to "avoid the potential prejudice." State-Record Co. v. South Carolina, 504 S.E.2d 592, 599 (S.C. 1998). The South Carolina court stated its decision to uphold the

The case began on November 7, 1990, when Manuel Noriega filed an emergency motion seeking to enjoin CNN from broadcasting tape recordings of his attorney-client conversations.[62] On November 8, the trial judge, Judge William Hoeveler, entered a temporary restraining order prohibiting CNN from broadcasting Noriega's attorney-client conversations until the court could review the tapes. The judge also ordered CNN to produce the tapes for the court's review. CNN immediately appealed the court's restraining order to the Eleventh Circuit and for the next two days, while its appeal to the Eleventh Circuit was pending, repeatedly broadcasted tapes of one attorney-client conversation.[63]

On November 10, the Eleventh Circuit upheld the district court's temporary injunction and ordered CNN to turn over its tapes.[64] CNN then filed an application to stay the restraining order and a petition for writ of certiorari to the United States Supreme Court.[65] Both were denied on November 18, 1990, over the dissent of Justices Marshall and O'Connor.[66] Two days later, CNN delivered copies of its tapes to the court. On November 28, after reviewing the tapes, Judge Hoeveler lifted the restraining order.[67] In 1994 CNN was found guilty of criminal contempt and agreed to pay $85,000 and read an on-air apology written by Judge Hoeveler.[68]

---

restraint "is bolstered by the uncertainty . . . created by the decisions of the District Court, and the Eleventh Circuit Court of Appeals, in *United States v. Noriega*." *Id.* at 598.

62. 917 F.2d at 1546. The recordings were made by officials at the Metropolitan Correction Center ("MCC") where Noriega was incarcerated. Noriega had learned CNN possessed at least one attorney-client conversation when, after asking Frank Rubino, Noriega's lead counsel, for an interview, CNN personnel appeared at Rubino's office and played a tape of a conversation between Noriega and certain members of his defense team. The conversation involved, among other things, a discussion of two potential government witnesses in Noriega's criminal prosecution. CNN notified defense counsel it possessed seven tape recordings containing several of Noriega's conversations made from MCC and that it intended to broadcast the conversations on national television. 865 F. Supp. at 1551.

63. *Id.* at 1544-46; *see also* 865 F. Supp. at 1551.

64. 865 F. Supp at 1551.

65. 498 U.S. 976, 976 (1990).

66. *Id.*

67. David Johnson, *Noriega Transcript Is Made Public*, N.Y. TIMES, Dec. 7, 1990, at A26. The New York Times reported that besides the banal, the transcripts revealed conversations that "were almost indecipherable to an outsider." *Id.*

68. *CNN Is Sentenced for Tapes And Makes Public Apology*, N.Y. TIMES, Dec. 20, 1994, at B7. The judge-written apology read by CNN stated,

> On November 1, 1994, the United States District Court for the Southern District of Florida found CNN guilty of criminal contempt after a trial. The court held CNN in contempt because CNN broadcast tape recordings of General Manual

The lower courts' mistakes stem from their starting point. The court began by applying the test announced in *Nebraska Press* that "requires a factual inquiry" on whether publication would impair the right to a fair trial and whether less restrictive alternatives are available.[69] The court reasoned that if a factual inquiry was needed, the press must be silenced by "a temporary restraint . . . [to] permit this court to make a determination based on the merits."[70]

The flaw in this reasoning is that it appears to circumvent the heavy presumption against prior restraints by simply terming them "temporary." Historically, as in *New York Times* and *Nebraska Press*, the Supreme Court has required those seeking to impose a prior restraint to demonstrate the likelihood of harm with a "high degree of certainty."[71] By contrast, the Eleventh Circuit placed no burden on Noriega before upholding the preliminary restraint. In fact, the court headed its discussion of the temporary injunction: "The District Court's Obligation When Confronted With *Allegations* Of Prejudicial Publicity."[72] Similarly, Judge Hoeveler stated that the mere "possibility of prejudicial disclosure" was sufficient to justify the restraint.[73]

The failure to require a threshold showing cannot be justified by a supposed distinction between "permanent" and "temporary" restraints. As the Supreme Court stated in *Alexander v. United States*,[74] "[t]emporary restraining orders and permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints."[75] After all, the restraint struck down in *Nebraska Press* was not a permanent gag order but applied only until a jury was impan-

---

Noriega's telephone conversations with his attorney in November 1990. CNN's broadcast of these recordings violated an explicit order of the United States District Court not to broadcast.

On further consideration, CNN realizes that it was in error in defying the order of the court and publishing the Noriega tape while appealing the court's order. We do now and always have recognized that our justice system cannot long survive if litigants take it upon themselves to determine which judgments or orders of court they will or will not follow. Ours is a nation of laws under which the very freedoms we espouse can be preserved only if those laws are observed. In the event unfavorable judgments are rendered, the right of appeal is provided. This is the course on which we should have relied. We regret that we did not.

Id.

69. *Noriega*, 752 F. Supp. at 1049.
70. 917 F.2d at 1547.
71. 403 U.S. at 714.
72. 917 F.2d at 1547 (emphasis added).
73. 752 F. Supp. at 1049.
74. 509 U.S. 544 (1993).
75. *Id.* at 550.

eled.[76] Thus, a preliminary injunction, even one eventually lifted as in *Noriega*, poses the same threat to First Amendment freedoms as the traditional presumptively invalid restraint.

Moreover, it is incorrect to justify the preliminary restraint as preserving the status quo. As Professor Rodney Smolla has noted, the legal status quo is that "CNN had a right to broadcast information in its possession at any moment it chose."[77]

Therefore, courts must treat preliminary restraints, like all other prior restraints, as presumptively unconstitutional and require a threshold showing before any preliminary restraint is issued.[78] Those seeking the restraint must present clear and convincing evidence they will be able to show the release of the information poses "an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."[79] Next, a trial court should be required to explore all alternatives to both preliminary restraints and to production orders. Finally, any request for a preliminary restraint or production order must be supported by proof that the desired restraint on the merits will effectively prevent the harm feared.[80]

---

76. 427 U.S. at 539; *see also* Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion) (stating, "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

77. RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 15-39 (1997).

78. This was the basis of Justices Marshall and O'Connor's dissent. CNN, Inc. v. Noriega, 498 U.S. at 976 (Marshall & O'Connor, JJ., dissenting) (stating that "the issue raised by this petition is whether a trial court may enjoin publication of information alleged to threaten a criminal defendant's right to a fair trial without any threshold showing that the information will indeed cause such harm and that suppression is the only means of averting it"). The dissent concluded that, indeed, if no such showing was required under *Nebraska Press*, "it is imperative that we re-examine the premises and operation of *Nebraska Press* itself." *Id.*

79. Craig v. Harney, 331 U.S. 367, 376 (1947).

80. If such a standard had been applied to the Noriega tapes case, the preliminary restraint would in all likelihood never have been issued. Most critically, Noriega's lawyer was permitted to raise the specter of prejudicial publicity without any justification beyond the talismanic recital of attorney-client privilege. If required to make a threshold showing, the lawyer would have been forced to concede, at least, that the actual tape he heard posed absolutely no threat of prejudicial publicity. If asked, he would have informed the court all he heard was Noriega stating he did not recognize the name of a potential witness. Such statements obviously pose no risk of tainting a jury pool. Certainly no restraint of any kind could have been justified to bar the playing of that particular tape.

Moreover, exploring alternatives to the production order would have alleviated the problem. Before issuing the production order, the court should have considered a procedure similar to that suggested belatedly by CNN after the adverse Eleventh Circuit ruling. If both CNN and the Government had turned over lists of the tapes they had, it would have revealed every tape Judge Hoeveler wanted to hear was already in government

Noriega presented a related issue: a production order requiring the tapes of the conversations be turned over to a judge for evaluation. From the days of the Star Chamber, censorship regimens have required printers to produce their writings for the government's pre-approval.[81] Prescreening permits censors to intimidate and silence speakers. Any effective legal protection against prior restraints must encompass strict safeguards against production orders. As Justice (then Judge) Kennedy wrote in overturning a production order, "[T]he press may not be required to justify or defend what it prints or says until after the expression takes place."[82]

That case involved a prisoner, Stanley Goldblum, convicted of securities and insurance fraud, who sought to prevent the broadcast of a movie about his crime. Goldblum argued that the film might jeopardize his possibility for parole and his ability to receive a fair trial both in a pending civil suit and in possible future criminal actions. A federal district judge ordered NBC to produce a copy of the film so that it could be reviewed for "inaccuracies."[83] The next day the court of appeals vacated the order.[84]

According to then-Judge Kennedy, the order for production of the tapes posed a two-pronged risk to freedom of expression. First, it created "a reasonable apprehension of an impending prior restraint."[85] Second, the order threatened "interference with the editorial process."[86] The First Amendment required that the production order be struck down because "[a]n order thus aimed toward prepublication censorship is an inherent threat to expression, one that chills speech."[87]

A production order is qualitatively different from a warrant demanding production of information. Such a warrant is part of an investigation for criminal evidence. By contrast, "[t]he express and sole purpose of the district court's order to submit the film for viewing by the court was to determine whether or not to issue an injunction suspending its

---

hands. Thus, the Government, not the press, would have been required to produce the tapes.

The problem of the release of privileged information could also have been addressed by alternatives to prior restraint. Simply requiring the sequesteration of the prosecutorial staff, as was ordered after the tapes were given to the court, would have alleviated the unique danger of disclosing attorney-client discussions.

81. *See* Meyerson, *supra* note 36.
82. Goldblum v. NBC, 584 F.2d 904, 907 (1978).
83. *Id.* at 905-06.
84. *Id.* at 906.
85. *Id.* at 907.
86. *Id.*
87. *Id.*

broadcast."[88] A court must recognize the common constitutional threat posed by a production order and the ultimate restraint being sought: "The order to produce the film in aid of a frivolous application for a prior restraint suffers the constitutional deficiencies of the application for an injunction."[89]

Interestingly, if the *Noriega* court had issued a production order, not for the purpose of considering a restraint on CNN, but instead to determine what alternatives were available for preserving a fair trial, the order would be easier to defend. With the taint of prior restraint removed, the order would not create the impermissible chilling effect from government intrusion into the editorial process.

B. Unlimited Executive Discretion

When those administering a registration or licensing system are given unlimited discretion over speakers, the dangers of nonreviewable censorship are unacceptable. Thus, regulation involving leafletting,[90] parades,[91] charity solicitation,[92] and the placement of newspaper vending machines[93] have all been declared unconstitutional when those in charge could select which communicators would be favored and which would be silenced.

The Supreme Court has given two main reasons why, in "the absence of narrowly drawn, reasonable and definite standards for the officials to follow,"[94] freedom of expression is harmed: "self-censorship by speakers in order to avoid being denied a license to speak[,] and the difficulty of effectively detecting, reviewing, and correcting content-based censorship."[95] The first reason, self-censorship, has been properly criticized as an insufficient basis for treating these prior restraints differently

---

88. *Id.* at 906.

89. *Id.* at 907. Justice Kennedy did not join with Justices Marshall and O'Connor in opposing Judge Hoeveler's order requiring CNN to produce the Noriega tapes. 498 U.S. at 976. One likely distinguishing feature was that, unlike the movie, the Noriega tapes were not the product of CNN's editorial labor. Rather, they were merely copies of tapes recorded by prison officials at the MCC. Arguably, producing someone else's work product does not create the same sort of intimidation as a review of one's own editorial creation.

90. Lovell v. City of Griffin, 303 U.S. 444 (1938).

91. *See, e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Niemotko v. Maryland, 340 U.S. 268 (1951).

92. *See, e.g.*, Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947 (1984); Cantwell v. Connecticut, 310 U.S. 296 (1940).

93. City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988).

94. *Niemotko*, 340 U.S. at 271.

95. *Lakewood*, 486 U.S. at 759.

than subsequent punishment. Obviously, a realistic threat of criminal sanction will also tend to cause self-censorship.[96]

The far more relevant concern with this sort of prior restraint is that courts will be unable to review the action of a decision-maker who is not bound by definite standards, if only favored speakers are selected:

> Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.[97]

Unlimited discretion, thus, creates a prior restraint. The administrator of the system is given the ability to select who will be permitted to speak, and the courts are unable to prevent the silencing of disfavored speakers. By contrast, a registration or licensing system that does not vest discretion in the administrator is generally not considered to be a prior restraint. Abuse of such processes can be readily detected by any reviewing court. Accordingly, systems such as those providing for first-come, first-served registration for using a public park do not pose a First Amendment problem.[98]

C. Procedural Safeguards for Executive Decision-Making

The Supreme Court has also required extensive procedural safeguards for those instances when executive branch licensing or censorship is permitted. Beginning in 1965, the Court has announced a rigid set of guidelines to ensure adequate judicial review of executive restraints on speech.

The need for procedural protection is based on a fundamental distrust of the executive branch functionary who would make the initial decision: "Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally-protected interests in free expression."[99] The risks to First Amendment freedoms from improper

---

96. *See, e.g.*, Blasi, *supra*, note 5, at 35.

97. 486 U.S. at 758.

98. *See* Cox v. New Hampshire, 312 U.S. 569, 574-576 (1941).

99. Freedman v. Maryland, 380 U.S. 51, 57-58 (1965); *see also* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560-61 (1975) (stating, "[a]n administrative board assigned to screening stage productions—and keeping off stage anything not deemed culturally uplifting or healthful—may well be less responsive than a court, an independent branch of government, to constitutionally protected interests in free expression").

decision-making are so great that any system in which the government can restrict expression prior to its communication must be "operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint."[100]

In the 1965 case of *Freedman v. Maryland*,[101] the Court announced the procedural safeguards it had "designed to obviate the dangers of a censorship system."[102] In any system of prior restraint:

> *First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured.[103]

These procedures protect speech in a number of important ways. By placing the burden of persuasion on the censor, the Court protects the "transcendent value of speech," even at the cost of foregoing the punishment of some unprotected speech.[104] Next, by requiring the government to seek judicial review and enforcing this requirement by limiting the duration of any restraint to that necessary for review, the Court prevents the censor's decision from being the final decision.[105]

These safeguards have been held applicable not only to censorship boards, but also to systems of informal censorship. Thus, in *Bantam Books, Inc. v. Sullivan*,[106] the Court struck down Rhode Island's use of a "Commission to Encourage Morality in Youth," which advised book distributors and police that it had determined specific books to be obscene or otherwise "objectionable."[107] The Court viewed this informal system as "a form of effective state regulation superimposed upon the State's criminal regulation of obscenity and making such regulation largely unnecessary."[108] Despite the fact the commission lacked enforcement power, the Court ruled that "informal censorship may

---

100. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).
101. 380 U.S. 51 (1965).
102. *Id.* at 58.
103. *Southeastern Promotions*, 420 U.S. at 560 (summarizing *Freedman*, 380 U.S. at 58-59). The *Southeastern Promotions* description is far more succinct than that in *Freedman*.
104. Speiser v. Randall, 357 U.S. 513, 526 (1958).
105. *Freedman*, 380 U.S. at 58.
106. 372 U.S. 58 (1963).
107. *Id.* at 59.
108. *Id.* at 69.

sufficiently inhibit the circulation of publications" to require the safeguards of judicial supervision with immediate judicial review.[109]

The Supreme Court has also recognized procedural safeguards are needed to police judicial, as well as administrative, restraints. Thus, courts are prohibited from issuing ex parte injunctions against speech unless "it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate."[110] Moreover, just as adverse decisions of censors must be subject to prompt judicial review, adverse decisions of courts must be subject to prompt appellate review. When the town of Skokie, Illinois, tried to prevent a Nazi parade, the Supreme Court noted an injunction that lasted throughout an extended appellate process could last more than a year.[111] Thus, concluded the Court, "If a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards, including immediate appellate review."[112]

III. EXCLUSIONS FROM AND EXCEPTIONS TO THE PRIOR RESTRAINT DOCTRINE

Providing a definition of prior restraint is only half the job. It is also necessary to describe, define, and delimit the exceptions to the prior restraint doctrine. One of the greatest sources of confusion surrounding the prior restraint doctrine has been the scope of the exceptions to the doctrine. The usual starting point for analyzing the exceptions to the prior restraint doctrine is the dicta from *Near*, in which the Court announced the four "exceptional cases" when the absolute ban on prior restraint is eased: troop movements, obscenity, incitement and other words that have "all the effect of force," and the protection of private rights according to equitable principles.[113] Unfortunately, this listing has proven to be one of the major obstacles to a full understanding of the prior restraint doctrine. It does not describe the rationale for inclusion in, or exclusion from, the role of "exceptional" cases. Ironically, not only does the casualness of the list invite overuse of prior restraint, several important exceptions are omitted from the list as well.

If the prior restraint doctrine is to be an honest principle of adjudication, the exceptions must be justified based on the historical and practical postulates of the doctrine itself. Moreover, there must be consistency in determining which restraints are exceptions and which are subject to the rigors of the doctrine.

---

109. *Id.* at 67.
110. Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 180 (1968).
111. National Socialist Party of America v. Village of Skokie, 432 U.S. 43, 44 (1977).
112. *Id.*
113. *Near*, 283 U.S. at 716.

Further, it must be recognized that many restrictions on speech are not prior restraints at all. Restraints that do not threaten the separation of powers, such as judicial orders governing trial participants or executive branch contracts limiting speech by executive branch employees, should not be regarded as prior restraints. Similarly, taxes on speakers that do not require a particularized analysis of the content of expression should not be treated as a prior restraint. Finally, regulation of conduct or property rights should not be regarded as a prior restraint, even when expression is combined with the conduct (as in commercial speech) or the property right (as with copyrights).

All these forms of regulation, though, are still governed by the First Amendment and may be struck down pursuant to other forms of analysis. The First Amendment is broad enough to prevent encroachments on freedom of speech without categorizing all encroachments as prior restraints. Most significantly, there is a real danger that if all forms of regulation are linked with prior restraint, the result will be a watered-down form of protection against true prior restraints. For example, when the Court has tried to explain why an order limiting commercial speech or prohibiting a demonstration near a hospital is a *permissible* prior restraint, the rationale sets the stage for a wholesale retreat from the purity of the true prior restraint doctrine.[114]

Any deviation from the traditional ban on prior restraint, however, can easily lead to the exceptions swallowing the rule. The exclusions from the prior restraint doctrine and the exceptions from the rule, therefore, must be "narrowly defined."[115] Accordingly, courts must be vigilant to maintain the safeguard that "[a]ny system of prior restraints of expression comes . . . bearing a heavy presumption against its constitutional validity."[116]

A. Restraints on Expression That Do Not Create a Prior Restraint

1. Preserving Order in the Court. The issuance of judicial orders to preserve order in the courtroom and ensure a fair trial presents a particularly difficult challenge for any theory of prior restraint. An inherent paradox lies in the fact that the injunction against expression

114. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973).

115. *Southeastern Promotions*, 420 U.S. at 559.

116. *Bantam Books*, 372 U.S. at 70.

is both the traditional paradigm of the unconstitutional prior restraint and the traditional means for judges to control their courtrooms.[117]

Drawing the line between these two is a delicate task that will be helped by two related observations. First, judicial orders issued to trial participants and to those within the courtroom are so fundamentally different from classic prior restraints that they should not be considered prior restraints. Second, even though these orders should not be considered prior restraints, they are still subject to the stringent commands of the First Amendment.

The primary distinction between judicial orders restricting trial participants and restrictions against the media and other traditional prior restraints is that the former do not threaten the separation of powers.[118] It is within the "inherent equitable powers of courts of law over *their own process*, to prevent abuses, oppression, and injustices."[119] Judges have a unique interest in the effect that the conduct of the parties to a case before them will have on the trial of that case, and a judge's orders in that regard do not encroach on the responsibility reserved for the legislative or executive branch.[120]

Moreover, the judicial power to control the speech of the participants in a case about that particular case is a far more circumscribed power than that possessed by those wielding traditional prior restraints.[121] The judicial order in these narrow instances "does not raise the same specter of government censorship that such control might suggest in other situations."[122] Especially when the media is free to comment on the court, the ability of a judge to control out-of-court discussion is extremely limited.

---

117. *See Near*, 283 U.S. at 715 ("There is . . . the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions.").

118. *See supra* Part II. The distinction is far less problematic than the implication that the media has speech rights greater than the average citizen. *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 241 (1989) (stating that "[c]ertainly, there is no reason to give the press special rights to be free of gag orders or prior restraints on its speech").

119. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 35 (1984) (quoting International Prods. Corp. v. Koons, 325 F.2d 403, 407-08 (2d Cir. 1963)) (emphasis added).

120. One court referred to these orders as "actions taken by the court in its legislative role [rather than] those taken in its adjudicative role." Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248 (7th Cir. 1975).

121. In the words of Blackstone, "To subject the press to the restrictive power of the censor, as was formerly done . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government." BLACKSTONE, *supra* note 30, at 153.

122. *Seattle Times*, 467 U.S. at 32.

Historically, courts have always had the power to punish for contempt, a power that is not inconsistent with our historic antipathy to prior restraint.[123] As the Supreme Court stated in 1812:

> [c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution . . . . To fine for contempt—imprison for contumacy—inforce [sic] the observance of order, [etc.] are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.[124]

Accordingly, court orders restraining speech inside the courtroom are not only permissible, they are the norm: "Courts independently must be vested with '*power to impose silence,* respect, and decorum, in their presence . . . .'"[125]

But the power to punish for contempt has long been recognized as one particularly subject to abuse: "That contempt power . . . is capable of abuse is certain. Men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir."[126]

Distrust of the judiciary led Congress, early in the nineteenth century, to delimit the power of federal judges to hold out-of-court speakers in

---

123.

> The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.

Ex parte Robinson, 86 U.S. (19 Wall.) 505, 510 (1873).

124. United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812); *see also* International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 832 (1994) ("The necessity justification for the contempt authority is at its pinnacle, of course, where contumacious conduct threatens a court's immediate ability to conduct its proceedings, such as where a witness refuses to testify, or a party disrupts the court . . . . In light of the court's substantial interest in rapidly coercing compliance and restoring order, and because the contempt's occurrence before the court reduces the need for extensive factfinding and the likelihood of an erroneous deprivation, summary proceedings have been tolerated.").

125. *International Union, United Mine Workers,* 512 U.S. at 831 (quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821)); *see also* Gulf Oil Co. v. Bernard, 452 U.S. 89, 104 n.21 (1981) ("In the conduct of a case, a court often finds it necessary to restrict the free expression of participants, including counsel, witnesses, and jurors.").

126. Sacher v. United States, 343 U.S. 1, 12 (1952); *see also* Bloom v. Illinois, 391 U.S. 194, 201 (1968) (stating that contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament; even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of officers of the court).

contempt. In 1826 Judge James H. Peck summarily imprisoned and disbarred Luke Lawless for contempt after Lawless published an unflattering criticism of one of Peck's opinions. In 1831 the United States Senate came within one vote of impeaching Judge Peck for abusing judicial power.[127] The day after the impeachment vote, the Senate began considering legislation to ensure, in the words of James Buchanan, that Judge Peck was the "last man in the United States to exercise this power, and Mr. Lawless has been its last victim."[128]

The new law prevented federal judges from using summary contempt powers against out-of-court statements, limiting such power to behavior "in the presence of the said courts, or so near thereto as to obstruct the administration of justice."[129] The Supreme Court has stated that "viewed in its historical context," this law demonstrates "a respect for the prohibitions of the First Amendment, not as mere guides to the formulation of policy, but as commands the breach of which cannot be tolerated."[130]

Judges, therefore, are essentially barred from using their traditional contempt power to punish out-of-court statements in the interest of protecting "the administration of justice."[131] *Nebraska Press* confirmed and expanded the basic principle that judges may not enjoin the out-of-

---

127. The vote in favor of Judge Peck was probably based, in part, on "humane considerations, accentuated by the Judge's age and blindness." Felix Frankfurter & James Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1024 (1924).

128. ARTHUR STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK 464 (1833). James Buchanan had been in charge of the prosecution of Judge Peck in the Senate. Nye v. United States, 313 U.S. 33, 45 (1941).

129. Act of Mar. 2, 1831, ch. 98; 4 Stat 487 (1831). The same language can be found today at 28 U.S.C. § 385 (1995). As if to show the difficulty in constraining judicial power, the Court in *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 419 (1918), interpreted this language so broadly as to permit out-of-court conduct to be punished summarily if it had a "tendency to prevent and obstruct the discharge of judicial duty." Finally, in *Nye*, 313 U.S. at 52, the Court restored the statute to its intended meaning, ruling that the conduct subject to summary contempt proceeding was limited to "misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business."

130. Bridges v. California, 314 U.S. 252, 267 (1941). In *Bridges* the Court confirmed it was unconstitutional for a judge to hold an out-of-court speaker in contempt for "disrespect" and could use contempt power only to prevent a "clear and present danger" the publication would cause the "disorderly and unfair administration of justice." *Id.* at 263, 270.

131. The First Amendment restricts the contempt powers for state judges in essentially the same manner as the federal statute restricts federal judges. *Compare Bridges*, 314 U.S. at 267 *with Nye*, 313 U.S. at 47-48.

court statements of nonparticipants and that such injunctions will be struck down as improper prior restraints.

In *Nebraska Press*, the Court implied that an acceptable alternative to prior restraint might be to "limit what the contending lawyers, the police, and witnesses may say to anyone."[132] In recognizing that such limits might face constitutional scrutiny as well, the Court correctly did not refer to them as prior restraints but recognized that such limits on speech were still "subject to challenge as interfering with press rights to news sources."[133]

In fact, the use of the prior restraint doctrine to analyze restrictions on the speech of trial participants is problematic. Even though these restrictions constitute a "predetermined judicial prohibition restraining specific expression,"[134] attempts to treat them as prior restraints have proven to be confusing and unnecessary and seriously threaten to dilute the protections afforded by the doctrine.

The confusion has been noted by one court that complained that more than twenty years after *Nebraska Press*, "[n]o certain consensus exists as to whether an order that regulates the trial participants' extrajudicial statements is a prior restraint."[135] Indeed, numerous cases can be found on both sides of the question of whether to term these orders prior restraints.[136] Some courts have even treated the exact same order as a prior restraint if challenged by the gagged party, but not if challenged by the media.[137] Two Supreme Court cases involving restrictions on the speech of trial participants—one a court order, the other a subsequent punishment—reveal the prior restraint appellation favored by many lower courts is mere surplusage.

In *Gentile v. State Bar of Nevada*,[138] the Supreme Court upheld a Nevada Supreme Court rule prohibiting lawyers from issuing out-of-court statements about pending cases "if the lawyer knows or reasonably

---

132. *Nebraska Press*, 427 U.S. at 564.

133. *Id.* at 564 n.8.

134. Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248 (7th Cir. 1975), *cert. denied sub nom.* Cunningham v. Chicago Council of Lawyers, 427 U.S. 912 (1976).

135. United States v. Davis, 902 F. Supp. 98, 102 (E.D. La. 1995).

136. For cases finding such an order to be a prior restraint, see *Twohig v. Blackmer*, 918 P.2d 332, 336 (N.M. 1996); *United States v. Salameh*, 992 F.2d 445, 446-47 (2d Cir. 1993); *Breiner v. Takao*, 835 P.2d 637, 640-41 (Haw. 1992); *Davenport v. Garcia*, 834 S.W.2d 4, 9-11 (Tex. 1992); *Kemner v. Monsanto Co.*, 492 N.E.2d 1327, 1336 (Ill. 1986); *Chase v. Robson*, 435 F.2d 1059, 1061 (7th Cir. 1970). For cases finding these orders are not prior restraints, see *Radio & Television News Ass'n v. United States Dist. Court*, 781 F.2d 1443, 1446 (9th Cir. 1986); *Bauer*, 522 F.2d at 248.

137. *See, e.g.*, *In re* Application of Dow Jones & Co., 842 F.2d 603, 609 (2d Cir. 1988), *cert. denied*, 488 U.S. 946 (1988); *but see*, CBS v. Young, 522 F.2d 234, 239 (6th Cir. 1975).

138. 501 U.S. 1030 (1991).

should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding."[139] Although the lawyer challenging the rule argued the antiprior restraint presumption of *Nebraska Press* should apply, the Court never even mentioned the phrase "prior restraint."[140] Instead, the Court said that as "officers of the court," lawyers' speech was protected by "a less demanding standard."[141] The Nevada court's rule met that standard because it was "narrowly tailored" to protect the "fundamental right to a fair trial by 'impartial' jurors."[142]

By contrast, the Court in *Butterworth v. Smith*[143] struck down a Florida statute that "prohibit[ed] grand jury witness[es] from ever disclosing testimony which [they] gave before that body."[144] The Court warned that under the Florida law, government critics could be easily silenced by simply calling them to testify before a grand jury because they would then be prevented from repeating their criticism outside the grand jury room.[145] Thus, the Court ruled it was necessary to balance the witness's "First Amendment rights against Florida's interests in preserving the confidentiality of its grand jury proceedings."[146] This balance strongly favors freedom of speech: "[W]here a person 'lawfully obtains truthful information about a matter of public significance . . . state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.'"[147] Because Florida could offer no such interest after the grand jury had concluded its business, the statute was declared unconstitutional.[148]

---

139. *Id.* at 1060.

140. *Id.* at 1065.

141. *Id.* at 1074. Justice Brennan, in his concurring opinion in *Nebraska Press*, though calling for a total ban on prior restraints of the speech of nontrial participants, also stated that "[a]s officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice." *Nebraska Press*, 427 U.S. at 601 n.27 (Brennan, J., concurring).

142. 501 U.S. at 1075-76.

143. 494 U.S. 624 (1990).

144. *Id.* at 626.

145. *Id.* at 635-36. The Court noted that "[t]he potential for abuse of the Florida prohibition, through its employment as a device to silence those who know of unlawful conduct or irregularities on the part of public officials, is apparent." *Id.*

146. *Id.* at 630.

147. *Id.* at 632 (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979); Florida Star v. B.J.F., 491 U.S. 524, 533 (1989)).

148. In his concurrence, Justice Scalia stated there was "considerable doubt" whether a witness could be silenced even while the grand jury was sitting. *Id.* at 636 (Scalia, J.,

Note that the court order silencing speech was upheld in *Gentile*, and the statute imposing a subsequent penalty was struck down in *Butterworth*. Had the source of the rules been reversed, so that a statute barred lawyer statements causing "a substantial likelihood of impairing a fair trial" and a court order barred post-grand jury disclosures by witnesses, not only would the results have been the same, but the reasoning would have been unchanged as well.

The reasoning of both cases differs radically from the analysis of a classic prior restraint. Totally absent is the abhorrence of prior restraints as "the most serious and the least tolerable infringement on First Amendment rights."[149] Instead, the cases dealing with restrictions on the speech of trial participants involve a weighing of the free speech interests of the speaker with the governmental interest in a properly run judicial system. The speech interest varies with the role of the speaker—a lawyer willingly assumes certain responsibilities to the court that a mere witness does not. Moreover, for these restrictions to be constitutional, the degree of threat to the judicial system need not be as inevitable as the threat to the military of disclosing troop sailing dates nor need the potential harm be as disastrous.

And this is when the attempts to use the prior restraint doctrine to analyze judicial orders relating to trial participants pose their most serious threat to the First Amendment. Once it is conceded that courts have the ability, if not the duty, to protect the fairness of ongoing trials from the potential danger caused by statements and actions of trial participants, it is no longer possible to demand that the orders be issued only if the threatened harm is an absolute certainty.

None of the gag orders on trial participants that have been upheld would have survived the scrutiny demanded by *Nebraska Press* for orders silencing nonparticipants.[150] If those orders are really prior restraints, then the supposedly insurmountable barrier against prior

---

concurring).

149. *Nebraska Press*, 427 U.S. at 559.

150. *See, e.g.*, Levine v. United States Dist. Court for the Central Dist. of Calif., 764 F.2d 590, 598 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986) (finding out-of-court comments pose a "serious and imminent threat to the administration of justice," when defense attorneys had chosen directly to attack the prosecution's case in the media "during and immediately before trial"); United States v. Tijerina, 412 F.2d 661, 666 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969) (stating that the judicial order was appropriate because defendants' statements attacking the Government and the trial "made . . . while [the] criminal trial was pending [were] not compatible with the concept of a fair trial"); *In re* Russell, 726 F.2d 1007, 1010 (4th Cir.), *cert. denied*, 469 U.S. 837 (1984) (upholding gag order imposed on witnesses because of "tremendous publicity . . . [and] the potentially inflammatory and highly prejudicial statements").

restraint is capable of being scaled rather easily. If the doctrine of prior restraint is to retain its vigor, judicial orders affecting only trial participants should be treated as restrictions that are distinct from prior restraint in history, purpose, and constitutional doctrine.

Nonetheless, restrictions on speech are always causes of concern. The Court opined that "[t]o conclude that this is not a case of prior restraint of the press is not to say that the restraining order need not be justified."[151] The question that finally must be resolved is what level of justification is needed for the different judicial orders. The Supreme Court upheld a ban on disclosing discovery information based on the moderate standard of "'further[ing] a substantial governmental interest unrelated to the suppression of expression,'" and limiting "'First Amendment freedoms no greater than is necessary.'"[152] In striking down the statute limiting speech by grand jury witnesses, however, the Court used a stricter standard demanding that the State prove "'a need to further a state interest of the highest order.'"[153]

The choice of an appropriate standard is important for balancing freedom of expression and the operation of our legal system. The resolution will be easier, though, if the judicial orders on trial participants are not considered prior restraints.

2. Contracting for Prior Restraints. A requirement that an author permit a government official to review a book prior to publication and delete portions deemed dangerous to the government sounds like an outrageous prior restraint worthy of the Star Chamber. In the government employment context, though, the validity of such a requirement must be evaluated without a simplistic reliance on the prior restraint doctrine.

Many governmental employers, from the Central Intelligence Agency to New York City's Administration for Children's Services, require their employees to get some form of permission before communicating with the

---

151. *In re* Application of Dow Jones & Co., 842 F.2d 603, 609 (2nd Cir. 1988), *cert. denied sub. nom.* Dow Jones & Co. v. Simon, 488 U.S. 946 (1988).

152. *Seattle Times*, 467 U.S. at 32 (quoting Procunier v. Martinez, 416 U.S. 396, 413 (1974)).

153. *Butterworth*, 494 U.S. at 632 (quoting Smith v. Daily Mail, 443 U.S. 97, 103 (1979); Florida Star v. B.J.F., 491 U.S. 524, 533 (1989)). Lower courts have utilized different standards, requiring either a "reasonable likelihood" or "a clear and present danger" of harm. *Compare In re* Application of Dow Jones & Co., 842 F.2d at 609 (requiring "reasonable likelihood"), *with* CBS v. Young, 522 F.2d at 238 (requiring "a clear and present danger").

public.[154] Some courts have evaluated the constitutionality of such requirements against the "general presumption against prior restraints on speech."[155] Other courts have argued that the unique features of employment context "dominate the special concerns about prior restraints."[156]

There are indeed valid concerns, similar to those raised by traditional prior restraints, whenever the government employer demands the right to review and restrict employee speech. Justice Stevens warned of "the risk that the reviewing agency will misuse its authority to delay the publication of a critical work or to persuade an author to modify the contents of his work."[157] While such concerns warrant serious First Amendment scrutiny, "[t]here is certainly no logical reason to think that the existence of some element of prior restraint should remove a restriction on employee speech from the usual . . . approach."[158]

This "approach" derives from the special relationship of government employee to government employer, which is obviously different from that of citizen to government. Government employees do not lose their right to freedom of expression but are subject to restrictions on their speech that would be unconstitutional were they applied to the general population.[159] It seems incontrovertible that "[w]hen someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her."[160]

---

154. *See, e.g.*, Snepp v. United States, 444 U.S. 507, 510-11 (1980) (upholding requirement that CIA employees obtain the Agency's prior approval before publishing information about the CIA); Harman v. City of New York, 140 F.3d 111, 115 (2d Cir. 1998) (striking down ban on employees of the Administration for Children's Services from speaking with the media regarding any activities of the agency without first obtaining permission from the agency's media relations department).

155. *Harman*, 140 F.3d at 119. *See* Fire Fighters Ass'n v. Barry, 742 F. Supp. 1182, 1194 (D.D.C. 1990) (stating that the vesting of discretion in an official "creates an unconstitutional prior restraint"); Spain v. City of Mansfield, 915 F. Supp. 919, 923 (N.D. Ohio 1996); *see also* Zook v. Brown, 865 F.2d 887, 890 (7th Cir. 1989) (upholding a regulation despite it being "a prior restraint on the free speech of a public employee").

156. Weaver v. United States Info. Agency, 87 F.3d 1429, 1440 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997); *see also* Westbrook v. Teton County School Dist., 918 F. Supp. 1475, 1482 (D. Wyo. 1996) (stating that school policy prohibiting faculty criticism of the administration "is not . . . a constitutionally suspect 'prior restraint'").

157. *Snepp*, 444 U.S. at 526 (Stevens, J., dissenting).

158. *Weaver*, 87 F.3d at 1440.

159. Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

160. Waters v. Churchill, 511 U.S. 661, 675 (1994) (plurality opinion).

To apply the prior restraint doctrine to such a restriction would create a watered-down version of the doctrine. Prior restraints can be imposed only when the risk of catastrophic harm is a virtual certainty. In contrast, courts have "consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large."[161]

Moreover, treating employer rules as prior restraints would be inappropriate. As with judicial orders limiting the speech of trial participants, the restrictions on speech imposed by the executive branch on its own employees do not present the separation of powers difficulties of traditional prior restraints. Restrictions imposed in furtherance of the interests of "an employer in regulating the speech of its employees"[162] do not encroach on the law-making function of the legislative branch. In addition, unlike traditional prior restraints, the limitations of employee speech were voluntarily assumed in exchange for the benefits of employment.[163] The restraint is not imposed by the might of the sovereign but can be declined by those willing to forego the job opportunity.[164]

The First Amendment still plays a vital role in policing contractual agreements imposing previous restriction on employee expression. In *Snepp v. United States*,[165] the Court upheld the constitutionality of a contractual requirement that barred a former CIA employee from publishing any book on the CIA without receiving "specific prior approval by the Agency."[166] Significantly, the Court did not say that the CIA had final discretion over what was published. Instead, if the

---

161. *Id.* at 673.

162. 391 U.S. at 568.

163. *See, e.g.*, *Snepp*, 444 U.S. at 509 n.3 (stating that "[w]hen Snepp accepted employment with the CIA, he voluntarily signed the agreement that expressly obligated him to submit any proposed publication for prior review"). The Court in *Snepp* said the agreement was entered into voluntarily and there was no claim Snepp "executed this agreement under duress." *Id.*

164. There is also a strong argument that it is beneficial for government employees to know the precise rules before speaking, rather than risk "the ad hoc, on-the-job reactions that have been standard fare in many of our employment cases." *United States v. National Treasury Employees Union*, 513 U.S. 454, 481 (1995) (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor notes there are benefits to both employer and employee in "ex ante rules, in contrast to ex post punishments." *Id.* at 480. These benefits are lost if the term "prior restraint" is automatically applied to all ex ante rules by a government employer.

165. *Snepp*, 444 U.S. 507.

166. *Id.* at 508, 516. The Court also upheld an injunction "against future violations of Snepp's prepublication obligation." *Id.* at 509.

CIA had believed particular information to be harmful and the employee did not agree, "the Agency would have borne the burden of seeking an injunction against publication."[167] Also, the Government must show that the speech interests both of employees and their potential audiences are "outweighed by that expression's 'necessary impact on the actual operation' of the Government."[168]

The courts must not permit the government employer to use contractual provisions to censor critics.[169] But the prior restraint doctrine is neither the necessary nor the appropriate mechanism for protecting the free speech rights of government employees.

3. Taxing the Press. The Court has intermittently equated taxation of the press with prior restraint. This not only clouds the real definition of prior restraint, but it is unnecessary because differential taxation of the press can be found unconstitutional without any reference to the prior restraint doctrine.

In *Jimmy Swaggart Ministries v. Board of Equalization of California*,[170] the Court upheld the application of a generally applicable sales tax to the distribution of religious materials by a religious organization.[171] The Court distinguished this general tax from taxes that had been struck down in earlier cases: a flat licensing fee, challenged by Jehovah's Witnesses, imposed on those distributing religious literature,[172] and a requirement, challenged by an evangelist, that required all booksellers to pay a flat fee to obtain a license to sell books.[173] According to the Court in *Jimmy Swaggart Ministries*, those earlier cases prohibit taxation only when "a flat license tax operates as a prior

---

167. *Id.* at 513 n.8 (citing Alfred A. Knoff, Inc. v. Colby, 509 F.2d 1362, 1369 (4th Cir. 1975); United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1992)).

168. *National Treasury Employees Union*, 513 U.S. at 468 (quoting *Pickering*, 391 U.S. at 571). In *National Treasury Employees Union*, the Court struck down a ban on federal employees receiving honoraria for appearances, speeches, or articles. *Id.* at 457. This balancing test applies only when the employee speaks "as a citizen upon matters of public concern" rather than "as an employee upon matters only of personal interest." Connick v. Myers, 461 U.S. 138, 147 (1983).

169. For an excellent discussion of this concern, see Alan Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORN. L. REV. 261 (1998). Professor Garfield proposes that courts not enforce contractual restraints on employee speech "when the public interest in access to the suppressed information outweighs any legitimate interest in contract enforcement." *Id.* at 266.

170. 493 U.S. 378 (1990).

171. *Id.* at 378.

172. Murdock v. Pennsylvania, 319 U.S. 105, 106 (1943).

173. Follett v. Town of McCormick, 321 U.S. 573, 574 (1944).

restraint on the free exercise of religious beliefs."[174] What made these taxes operate as a prior restraint, according to the Court, was that the taxes, which were "unrelated to the receipts or income of the speaker or to the expenses of administering a valid regulatory scheme [were imposed] as a *condition* of the right to speak."[175]

What is wrong with this analysis is that a tax imposed by a legislature is not a prior restraint merely because it operates as a condition of the exercise of free communication. All taxes, permissible and impermissible alike, function as conditions on speech. Moreover, unlike prior restraints, the forbidden taxes do not permit particularized analysis of the content of the speakers, and no government official is "authorized to take notice of writings intended for the press."[176] These taxes do not put either the executive or judiciary in the position of censor. But, despite the fact that they should not be labeled a prior restraint, these taxes were indeed unconstitutional.

The better approach would be to say, directly, that while general taxation that includes the press along with others is perfectly constitutional, a tax aimed at either the press in general or focused on a segment of the press in particular is per se unconstitutional. Such differential taxation, reminiscent of the English "taxes on knowledge," has no place under our First Amendment.[177]

After press licensing ended in England at the end of the seventeenth century, the Crown searched for a new device for control of its critics. Fearing most the ability of inexpensive publications to reach a wide number of the less affluent in the general population, Parliament imposed in 1712 a tax on all newspapers and advertisements. It was widely understood "the main purpose of these taxes was to suppress the publication of comments and criticisms objectionable to the Crown."[178] The 1765 imposition on the American colonies of a similar tax, the Stamp Act, has been termed the moment when "the revolution really began."[179] These taxes were not considered to be a prior restraint but

---

174. 493 U.S. at 389.

175. *Id.* at 388 (quoting Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 587 n.9 (1983)).

176. 3 STORY, *supra* note 35 § 1879.

177. *See generally* 1 COLLETT DOBSON, HISTORY OF THE TAXES ON KNOWLEDGE 4-6, T.F. Unwin (1889). As the Supreme Court has stated, the phrase "taxes on knowledge" was used "for the purpose of describing the effect of the exactions and at the same time condemning them." Grosjean v. American Press Co., 297 U.S. 233, 246 (1936).

178. 297 U.S. at 246.

179. *Id.* (citing William Stewart, *Lennox and the Taxes on Knowledge*, 15 SCOTTISH HISTORICAL REV. 322, 327 (1918)).

were condemned as "a new restraint,"[180] adopted "avowedly for the purpose of restraining the Press generally and of crushing the smaller papers."[181]

In *Grosjean v. American Press Co.*,[182] the Court used similar reasoning to strike down Louisiana's tax on the gross receipts from the sale of advertising on all newspapers with a weekly circulation above twenty thousand.[183] Although alluding to the prior restraint doctrine,[184] the Court stressed the independent history of antipathy to "taxes on knowledge." The Court declared that the tax was "bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information."[185]

Thus, the issue of taxation of the press should be removed from analysis under the prior restraint doctrine. Instead, a more straightforward approach should be utilized. General taxation is permissible but specialized taxation against the press or a particular speaker is properly condemned as an unconstitutional "tax on knowledge." Not every violation of a free press is a prior restraint.

4. Speech as Property or Conduct. How can a system of justice that cherishes free speech and abhors prior restraints permit injunctions to be issued against a book publisher just because a book uses copyrighted material without permission? How can a speaker be enjoined from

---

180. 2 THOMAS E. MAY, CONSTITUTIONAL HISTORY OF ENGLAND 108 (7th ed. 1864) (reprinted Fred B. Rothman & Co. 1986).

181. THOMAS PITT TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY 597 (6th ed. 1905).

182. 297 U.S. 233 (1936).

183. *Id.* at 250-51. The case was described more fully in *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), in which the Court stated the tax was imposed to limit the ability of the critics of Governor Huey Long to communicate with their readers. *Id.* at 579-80. The Court quoted Huey Long as terming this tax "a tax on lying, 2c [sic] a lie." *Id.* at 580.

184. 297 U.S. at 246. After describing examples of taxation against the press, the Court stated the First Amendment was meant to preclude the government "from adopting any form of previous restraint upon printed publications, or their circulation, including that which had theretofore been effected by these two well-known and odious methods." *Id.* at 249.

185. *Id.* at 250. A major danger with a tax on knowledge is the ability to alter the tax gives the government a perpetual threat over its potential critics. Accordingly, the Court in *Minneapolis Star & Tribune Co.* struck down a tax on the components used in printing newspapers: "Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." 460 U.S. at 585 (footnote omitted).

communicating particular words just because the words convey an extortionate threat?

The answers to such questions lie in the fact that speech can have multiple aspects beyond the mere expression of an idea. Speech can sometimes function as "verbal property" or "verbal acts."[186] These are not self-defining terms, and extraordinary care must be taken to prevent such terms from "cannibalizing speech values at the margin."[187]

i. Verbal Property. It is not a prior restraint for a court to enjoin the wrongful taking of verbal property. The injunction in this case is not silencing expression to prevent the harm it might do to other interests but is preventing the wrongful taking of the value the expression itself possesses.[188]

The most common form of verbal property is the copyright. Congress was given the power in the original Constitution to create "a marketable right to the use of one's expression."[189] Unlike defamation, copyright violations have long been prevented by injunction. In 1741 the court enjoined the unauthorized publication of letters written by the poet Alexander Pope on the theory that Pope possessed a continuing right in the property that the court may protect.[190] Similarly, in 1842 a New

---

186. The phrase "verbal acts" was used by the Supreme Court in *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 439 (1911). I use the phrase advisedly, as it has gone out of favor, largely, one suspects, because its use was often a rationale for the oppression of free communication. Properly defined though, the phrase "verbal acts" captures the essence of a speech/conduct dichotomy that removes certain regulation from the prior restraint doctrine. The phrase "verbal property" was chosen because of its parallel structure with verbal acts. *See also* Diane Zimmerman, *Information as Speech, Information as Goods*, 33 WM & MARY L. REV. 665 (1992). Professor Zimmerman's extraordinary article examines the difference between regulating information as a "public commodity" and as "a form of private wealth." *Id.* at 665.

187. Zimmerman, *supra* note 186, at 667 (footnote ommitted).

188. Other aspects of the First Amendment, though, may well affect the determination of whether an injunction is an appropriate remedy. *See, e.g.*, Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985) ("We do not suggest this right not to speak would sanction abuse of the copyright owner's monopoly as an instrument to suppress facts.").

189. *Harper & Row*, 471 U.S. at 558 (stating that "it should not be forgotten that the Framers intended copyright itself to be the engine of free expression"). Article I, § 8, of the Constitution provides: "The Congress shall have Power . . . to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

190. Pope v. Curl, 2 Eng. Rep. 342 (Ch. 1741). Similarly, a New York court in 1839, while finding that injunctions against libels were "infringing upon liberty of the press," held that equity courts could issue injunctions to protect "rights of literary property." Brandbreth v. Lance, 8 Paige's Chancery 24, 26-28 (N.Y. 1839).

York court upheld an injunction against the publication of private letters without the author's consent.[191] The court stressed the injunction was not based on a claim of privacy or defamation but instead "on no other principle and upon no broader ground than that of a [copyright] in literary productions."[192] The court permitted the injunction, stating that liberty of speech only encompasses the right "which every citizen has, to speak, write and publish his own sentiments, either originating with himself or such as he chosen [sic] to make his own by adoption with the consent of the author expressly or impliedly given, being responsible for the abuse of that right."[193]

The speaker who is the focus of the court's solicitude is the copyright holder and not the infringer.[194] Infringers want to speak the copyright holder's words; copyright holders want to retain control over their own speech. Injunctions against infringement merely reflect a constitutional preference for the person who created the speech in the first place.[195] Thus, author J.D. Salinger was able to enjoin a biographer from publishing excerpts of his unpublished letters.[196] The First Amendment "cost" of such a ruling is considered small, both because the original speaker still has the right to speak and the "infringer" is limited only as to "the form of expression and not the ideas expressed."[197]

---

191. Wetmore v. Sovell, N.Y. Ch. 515 (1842).

192. *Id.* at 556.

193. *Id.* at 562.

194. *See, e.g.*, *Harper & Row*, 471 U.S. at 559 (upholding copyright damages for unauthorized publication of excerpts of former-President Ford's memoirs).

195. *See, e.g.*, Estate of Hemingway v. Random House, Inc., 244 N.E.2d 250 (N.Y. 1968). The court stated,

> The essential thrust of the First Amendment is to prohibit improper restraints on the voluntary public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.

Id. at 255 (emphasis in original).

196. Salinger v. Random House, Inc., 811 F.2d 90, 100 (2d Cir. 1987).

197. *New York Times Co.*, 403 U.S. at 727 (Brennan, J., concurring). Justice White's attempt to distinguish copyright injunctions from the prior restraint sought against the Pentagon Papers was less successful: "[W]hen the press is enjoined under the copyright laws the complainant is a private copyright holder enforcing a private right." *Id.* at 731 n.1 (White, J., concurring). An injunction designed to protect a "private right" can still be an impermissible prior restraint. *See, e.g.*, CBS, Inc. v. Davis, 510 U.S. 1315, 1318 (1994) (striking down injunction against broadcast of a videotape of meat packing operations, which had been sought to prevent harms caused by trespass, breach of the duty of loyalty, and disclosure of trade secrets). And, of course, defamation, which seeks to protect the private right of reputation, is not enforced by injunction. *See, e.g.*, Kidd v. Horry, 28 F. 773, 776 (C.C.E.D. Pa. 1886).

Courts will also enjoin infringements of a "right to publicity."[198] This right may be thought of as a celebrity's right to the exclusive commercial use of his or her name and likeness.[199] The Supreme Court has stated that protection provided by the right to publicity is "closely analogous" to the protection of copyright law because both focus on "protecting the proprietary interest of the individual" and the "right of the individual to reap the reward of his endeavors."[200]

Another form of "proprietary speech" that courts will enjoin is the disclosure of trade secrets and other confidential business information by employees. As the Supreme Court has noted, "confidential information acquired or compiled by a corporation in the course and conduct of its business is a species of property to which the corporation has the exclusive right and benefit, and which a court of equity will protect through the injunctive process or other appropriate remedy."[201]

Copyright, the right of publicity, trade secrets, and confidential business information can all be considered to be verbal property. While there may well be other First Amendment questions surrounding their regulation, the prior restraint doctrine is not relevant. Courts are permitted to use their power of injunction to prevent the wrongful taking of the value the expression itself possesses.

It is critically important that injunctions be issued only to stop the wrongful taking of verbal property. In copyright, for example, a wrongful taking is nonpermissive and not fair use. A parody, therefore, cannot be successfully enjoined.[202]

---

198. *See, e.g.*, The Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. American Heritage Prods., Inc., 250 Ga. 135, 296 S.E.2d 697 (1982) (enjoining sale of busts of Rev. Martin Luther King, Jr.); Bi-Rite Enters., Inc. v. Bruce Miner Co., 757 F.2d 440, 441 (1st Cir. 1985) (enjoining distribution of posters depicting rock stars).

199. *See, e.g.*, Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 843 (S.D.N.Y. 1975).

200. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576 (1977) (upholding damages for television broadcast of the "entire act" of the "human cannonball"). The Court distinguished copyright and publicity damages, which were "proprietary," from defamation and false light privacy, which were "protecting feelings or reputation." *Id.*; *see also* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 406 (1960) (stating that the interest protected in the right of publicity cases "is not so much a mental as a proprietary one"). Moreover, in defamation and false light cases, "the only way to protect the interests involved is to attempt to minimize publication of the damaging matter" while in copyright and 'right of publicity' cases, "the only question is who gets to do the publishing." *Zacchini*, 433 U.S. at 573.

201. Carpenter v. United States, 484 U.S. 19, 26 (1987) (quoting 3 W. FLETCHER, CYCLOPEDIA OF LAW OF PRIVATE CORPORATIONS § 857.1, at 260 (rev. ed. 1986)); *see also* Cherne Indus., Inc. v. Grounds & Assocs., Inc., 278 N.W.2d 81, 94 n.9 (Minn. 1979) (stating that enjoining publication of trade secrets in violation of a contractual duty is not a prior restraint).

202. *See, e.g.*, Campbell v. Acuff-Rose Music, 510 U.S. 569, 583 (1994).

Similarly, the disclosure of confidential business information is only wrongful if done by someone who has acquired the information "by virtue of a confidential or fiduciary relationship."[203] Thus, *Business Week* could not be enjoined from publishing confidential business information about a trial litigant that a court had placed under seal.[204]

ii. Verbal Acts. Identifying verbal acts that can be enjoined is far more difficult than identifying verbal property because "[e]xpression and conduct . . . are inextricably tied together in *all* communicative behavior."[205] Because so much, if not all, expression involves "speech plus,"[206] a simple rule permitting restraints of the "plus" would eviscerate much of the First Amendment's protection. Nonetheless, restrictions that would be unconstitutional prior restraints are permissible in those instances when "speech is brigaded with action."[207]

For example, just as violence against property can be enjoined, so can threats to bring about violence.[208] It has sometimes been difficult for courts to identify the line between protected advocacy and an enjoinable "standing menace."[209] Applying this principle to physical demonstrations such as picketing, though, is especially difficult. Picketing is conduct that is an essential part of the exercise of First Amendment

---

203. Diamond v. Oreamuno, 248 N.E.2d 910, 912 (N.Y. 1969).

204. Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 232 (6th Cir. 1996).

205. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 827 (2d ed. 1988) (emphasis added).

206. *See, e.g.*, International Brotherhood of Teamsters Local 695 v. Vogt, 354 U.S. 284, 289 (1957); Bakery & Pastry Drivers & Helpers Local 802 of the Int'l Bhd. of Teamsters v. Wohl, 315 U.S. 769, 775 (1942) (Douglas, J., concurring).

207. Brandenburg v. Ohio, 395 U.S. 444, 456 (1969) (Douglas, J., concurring); *see also* Cox v. Louisiana, 379 U.S. 536, 563 (1965) (stating "certain forms of conduct mixed with speech may be regulated or prohibited"); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) (banning "placards used as an essential and inseparable part of a grave offense against an important public law").

208. Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co., 171 F. 553, 557-58 (M.D. Ala. 1909) ("The First Amendment does not protect violence."); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982).

209. In *Sherry v. Perkins*, 17 N.E. 307 (Mass. 1888), the court enjoined the display of a banner saying "Lasters are requested to keep away from P.P. Sherry's . . . . Per order L.P.U." because "[t]he banner was a standing menace to all who were, or wished to be, in the employment of the plaintiff, to deter them from entering the plaintiff's premises." *Id.* at 310. *Compare Beck v. Railway Teamsters' Protective Union*, 77 N.W. 13, 22 (Mich. 1898) (stating that circulars urging a labor boycott were a "standing menace") *with Marx & Haas Jeans Clothing Co. v. Watson*, 67 S.W. 391, 392 (Mo. 1902) (denying injunction against call for a labor boycott as a prior restraint).

freedoms.[210] Yet, it is conduct "subject to regulation even though intertwined with expression and association."[211] Fear of unrest or violence will not justify an injunction on picketing. The Court has permitted injunctions against peaceful picketing upon a record of "pervasive" or "extensive violence" but not "from a trivial rough incident or a moment of animal exuberance" or from "dissociated acts of past violence."[212]

Two cases illustrate this dichotomy. In *Organization for a Better Austin v. Keefe*,[213] the Supreme Court rejected a request to enjoin demonstrations "intended to exercise a coercive impact."[214] The Court stated that coercion, without more, means simply that the speakers "intended to influence [the listener's] conduct by their activities; this is not fundamentally different from the function of a newspaper."[215]

By contrast, the Court upheld an injunction against peaceful picketing in *Giboney v. Empire Storage & Ice Co.*[216] Because Missouri had made it illegal to refuse commerce with nonunion businesses, the picketing could be enjoined as "an integral part of conduct in violation of a valid criminal statute."[217] The communicative aspect of picketing did not prevent the injunction, the Court declared, because "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[218]

---

210. *See* Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 293 (1941) (stating that "[p]eaceful picketing is the workingman's means of communication"); *see also* Carey v. Brown, 447 U.S. 455 (1980).

211. *Cox*, 379 U.S. at 563; *see also* Hughes v. Superior Ct., 339 U.S. 460, 464 (1950) ("The Constitution does not demand that the element of communication in picketing prevail over the mischief furthered by its use in these situations."); Carpenters & Joiners Union of America, Local No. 213 v. Ritter's Cafe, 315 U.S. 722, 725 (1942) ("The petitioners now claim that there is to be found in the Due Process Clause of the Fourteenth Amendment a constitutional command that peaceful picketing must be wholly immune from regulation by the community in order to protect the general interest, that the states must be powerless to confine the use of this industrial weapon within reasonable bounds.").

212. *Milk Wagon Drivers*, 312 U.S. at 293-94, 296; *Claiborne Hardware*, 458 U.S. at 923-24; Youngdahl v. Rainfair, Inc., 355 U.S. 131, 140 (1957) (striking down injunction against peaceful picketing when violence was scattered in time).

213. 402 U.S. 415 (1971).

214. *Id.* at 419.

215. *Id.*

216. 336 U.S. 490, 494 (1949).

217. *Id.* at 498.

218. *Id.* at 502.

This principle permits the enjoining of speech in the labor context when persuasion becomes intimidation. The Supreme Court has held that an employer may communicate freely with employees "so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'"[219] This rule is based on the complex inter-relationship between the legitimate, but competing interests of labor and management: "[A]n employer's rights cannot outweigh the equal rights of the employees to associate freely."[220]

While such restrictions are permissible, the Supreme Court has not always been precise in describing why they are not prior restraints. In the 1994 case of *Madsen v. Women's Health Center, Inc.*,[221] for example, the Court upheld an injunction issued against demonstrators outside an abortion clinic in Melbourne, Florida.[222] After an initial injunction against blocking access to the clinic and physically abusing those entering the clinic was violated, a second, much broader injunction was issued.[223] Among other activities, this second injunction barred "congregating, picketing, patrolling, [and] demonstrating . . . within [36] feet of" the clinic.[224]

In a dismissive footnote, the Court explained why it did not consider this second injunction to be a prior restraint:

> Not all injunctions which may incidentally affect expression, however, are "prior restraints" . . . . Here petitioners are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the 36-foot buffer zone.

---

219. NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969).

220. *Id.* at 617; *see also* Thomas v. Collins, Sheriff, 323 U.S. 516, 537-538 (1945) ("When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed . . . . But short of that limit the employer's freedom cannot be impaired. The Constitution protects no less the employees' converse right."). Thus, the reason labor speech can be subject to injunction is not, as Justice White implied in the *Pentagon Papers* case, because "those enjoined . . . are private parties, not the press." *New York Times Co.*, 403 U.S. at 731 (White, J., concurring).

221. 512 U.S. 753 (1994). The prior restraint reasoning of Madsen was echoed in the 1997 case *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 374 n.6 (1997).

222. 512 U.S. at 776.

223. *Id.* at 759. This second injunction applied to Operation Rescue, named parties, and "those acting in concert with them." *Id.* at 760.

224. *Id.* at 759. The second injunction also prohibited (a) between 7:30 a.m. and noon [the time for surgical procedures and recovery periods], "singing, or . . . other sounds or images observable to or within earshot of the patients inside the clinic"; (b) within 300 feet of clinic "approaching any person seeking the services of the clinic unless such person indicates a desire to communicate"; and (c) "encouraging . . . other persons to commit any of the prohibited acts listed." *Id.* at 760.

> Moreover the injunction was issued not because of the content of petitioners' expression, . . . but because of their prior unlawful conduct.[225]

Thus, the Court stated, an injunction is not a prior restraint if the speaker can communicate in some other location and if the injunction is issued due to the speaker's prior unlawful conduct.[226] This reasoning cannot be correct.

The first contention, permitting injunctions because the speech may be made elsewhere, has been repeatedly rejected by the Court. In *Southeastern Promotions Ltd. v. Conrad*,[227] the Court found the denial of a municipal theater for a performance of the musical "Hair" to be an unconstitutional prior restraint.[228] The Court held the question of whether there were other theaters available in town was completely irrelevant:

> Whether petitioner might have used some other, privately owned, theater in the city for the production is of no consequence . . . . Even if a privately owned forum had been available, that fact alone would not justify an otherwise impermissible prior restraint. "[One] is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[229]

Thus, the Court concluded "it does not matter for purposes of this case that the board's decision might not have had the effect of total suppression of the musical in the community. Denying use of the municipal facility under the circumstances present here constituted the prior restraint."[230]

Similarly, the fact that the demonstrators in *Madsen* could demonstrate in some other locale does not keep the injunction from being a prior restraint.[231] Under any other rule, the government could mute

---

225. *Id.* at 764 n.2.

226. *Id.* at 763. The Court in *Madsen* held a special First Amendment standard would be applied "when evaluating a content-neutral injunction, ... [w]e must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Id.* at 765.

227. 420 U.S. 546 (1975).

228. *Id.* at 564.

229. *Id.* at 556 (quoting Schneider v. State, 308 U.S. 147, 163 (1939)).

230. *Id.*

231. The Court in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705-06 (1986), in permitting the closure of an adult bookstore as a nuisance because of onsite prostitution also seemed to hold that an injunction was not a prior restraint if communication could be conducted elsewhere: "[T]he order would impose no restraint at all on the dissemination of particular materials, since respondents are free to carry on their bookselling business at another location, even if such locations are difficult to find." *Id.* at 706 n.2. This

its critics by barring speakers from the most effective sites for their communications by arguing that they were not barred from "expressing their message in any one of several different ways."[232]

The second part of the *Madsen* analysis, that an injunction issued in response to "prior unlawful conduct" is not a prior restraint, also contradicts both precedent and the theory behind the prior restraint doctrine. In the foundation case of *Near v. Minnesota*, the Court struck down as a prior restraint an injunction that was only applied to newspapers that had already been convicted of violating state law.[233] Similarly, the Court in *Vance v. Universal Amusement Co.*[234] struck down a statute that authorized "state judges, on the basis of a showing that obscene films have been exhibited in the past, to prohibit the future exhibition of motion pictures that have not yet been found to be obscene."[235]

Enjoining future speech is simply an impermissible penalty for "prior unlawful conduct." Such injunctions are still prior restraint and present the same dangers of censorship as other types of injunctions.

The improper analysis of *Madsen* does not necessarily mean the injunction was unconstitutional but merely that the Court asked the wrong question. For while mere prior unlawful conduct is not a proper basis for injunctive relief against free expression, "[t]he First Amendment does not protect violence."[236] Accordingly, the proper inquiry in *Madsen* would have been to ask not whether there was prior unlawful conduct but whether the demonstrators had previously engaged in a pattern of extensive violence. If such a record could be established, it would then be appropriate to "enjoin acts of picketing in themselves peaceful [because] they are enmeshed with contemporaneously violent conduct."[237] By focusing on the law of "verbal acts," the result could

---

statement is not as troubling as the one in *Madsen*, though, because the case is easily rationalized on the basis on the second reason the Court gave for not treating the order as a prior restraint: "Second, the closure order sought would not be imposed on the basis of an advance determination that the distribution of particular materials is prohibited—indeed the imposition of the closure order has nothing to do with any expressive conduct at all." *Id.* Thus, *Arcara* can properly be read as simply holding that closing a business, including one that sells communicative material, on account of illegal nonspeech related activity is not a prior restraint. The reference to selling books "at another location" is merely proof that the closure is not related to the content of those books.

232. 512 U.S. at 764.

233. 283 U.S. at 722-23. The injunction was issued only after a finding that the newspaper had been "malicious, scandalous and defamatory." *Id.* at 706.

234. 445 U.S. 308 (1980).

235. *Id.* at 311.

236. *Claiborne Hardware*, 458 U.S. at 916.

237. *Milk Wagon Drivers Union*, 312 U.S. at 292.

have been the same without creating the risk of dangerous exceptions to the prior restraint doctrine.

Commercial speech is another area in which the Supreme Court has occasionally conflated the concept of prior restraints with that of verbal acts.[238] Among the many reasons the Court has given for permitting greater regulation of commercial speech is its intermingling of speech and conduct: "By definition, commercial speech is linked inextricably to commercial activity: . . . [and] 'the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.'"[239]

Thus, courts have repeatedly upheld orders requiring advertisers to cease and desist communicating misleading or unsubstantiated advertising, rejecting claims that these orders were unconstitutional prior restraints.[240] The Supreme Court has stated that the attributes of commercial speech "may also make inapplicable the prohibition against prior restraints."[241] While constitutional protection is given to truthful commercial speech concerning legal activities,[242] the prior restraint doctrine should not be part of the analysis. Accordingly, bans on misleading advertisements or advertisements for illegal activity do not run afoul of the First Amendment: "[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it."[243]

The Supreme Court, thus, created an unnecessary problem in prior restraint analysis in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*.[244] In *Pittsburgh Press*, the Pittsburgh Commission on Human Relations had obtained a court order barring newspapers from carrying help-wanted advertisements in gender-designated

---

238. Commercial speech is that speech which does "no more than propose a commercial transaction." *Pittsburgh Press Co.*, 413 U.S. at 385.

239. Friedman v. Rogers, 440 U.S. 1, 10 n.9 (1979) (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)).

240. *See, e.g.*, Sears, Roebuck & Co. v. FTC, 676 F.2d 385 (9th Cir. 1982); Jay Norris, Inc. v. FTC, 598 F.2d 1244 (2d Cir. 1979); Murray Space Shoe Corp. v. FTC, 304 F.2d 270 (2d Cir. 1962); E.F. Drew & Co. v. FTC, 235 F.2d 735 (2d Cir. 1956).

241. *Virginia Pharmacy Bd.*, 425 U.S. at 771-72 n.24; *see also* Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n, 447 U.S. 557, 571 n.13 (1980) ("We have observed that commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it.").

242. *See, e.g.*, Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999).

243. *Central Hudson Gas*, 447 U.S. at 563.

244. 413 U.S. 376 (1973).

columns.[245] In upholding this order, the Supreme Court gave an awkward explanation for why the injunction did not involve an impermissible prior restraint: "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment."[246]

It is wrong to imply that the prior restraint doctrine is concerned only with ensuring an adequate determination by a judge.[247] Certainly, such review is necessary to prevent the executive branch from operating as ultimate censor. But the prior restraint doctrine also controls when judges are permitted to make this adequate determination. As the Court stated when striking down the court-imposed restriction in *Nebraska Press Ass'n*, the First Amendment affords "special protection against orders that prohibit publication or broadcast of particular information or commentary-orders that impose a 'previous' or 'prior' restraint on speech."[248] Similarly, in *Vance v. Universal Amusement Co.*,[249] the Court held the prior restraint doctrine required careful procedures for regulating obscenity, despite "the fact that the temporary prior restraint is entered by a state trial judge rather than an administrative censor."[250]

Rather than rely on judicial involvement to avoid finding the order an unconstitutional prior restraint, the Court should have ruled that the prior restraint doctrine does not apply to commercial speech advertising illegal conduct.[251] This option was not really available to the Court in 1973 when it decided *Pittsburgh Press*. The modern doctrine of commercial speech only began in 1976 with the case of *Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, Inc.*[252]

---

245. *Id.* at 378.

246. *Id.* at 390.

247. A similar implication can be found in *Alexander v. United States*, 509 U.S. 544 (1993). "The constitutional infirmity in nearly all of our prior restraint cases involving obscene material . . . was that the government had seized or otherwise restrained materials suspected of being obscene without a prior judicial determination that they were in fact so." *Id.* at 551.

248. *Nebraska Press Ass'n*, 427 U.S. at 556.

249. 445 U.S. 308 (1980).

250. *Id.* at 317.

251. In fact, a close reading of the case shows the Court did rely, to some extent, on its conclusion that the want-ads were "classic examples of commercial speech." *Pittsburgh Press*, 413 U.S. at 385. As the Court noted in *Pittsburgh Press*, because sex discrimination in hiring is illegal, not only were the want-ads commercial speech, they were commercial speech for illegal activities. *Id.* at 388.

252. 425 U.S. 748 (1976). Citing "commonsense differences between speech that does 'no more than propose a commercial transaction,' and other varieties," the Court stated

Since *Virginia Pharmacy*, it has been clear that, in the words of Justice Brennan, "traditional prior restraint principles do not fully apply to commercial speech."[253]

It is very important that the prior restraint doctrine not be imported into the area of commercial speech. The limited prior restraint analysis in *Pittsburgh Press* is a clear example of the danger of which the Supreme Court has warned: "[T]he failure to distinguish between commercial and noncommercial speech 'could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech.'"[254]

A final issue of verbal acts involves the four privacy torts: publicity that places the plaintiff in a false light, commercial appropriation of name or likeness, intrusion upon seclusion, and public disclosure of private facts.[255] Each must be discussed individually to determine whether the connection between conduct and expression is sufficient to permit injunctive relief without violating the principles of the prior restraint doctrine.

The false light tort is functionally the same as defamation, and, thus, injunctive relief would be an unconstitutional remedy.[256] By contrast, appropriation, by infringing the right of publicity, is functionally theft of the commercial value in a celebrity's name or likeness, which, like the

---

more regulation was permissible for commercial speech than for non-commercial speech. *Id.* at 771 n.24. The major differences given were "the greater objectivity and hardiness of commercial speech." *Id.* at 772. Accordingly, the Court has evolved a four-part test for regulating commercial speech. First, is the speech protected by the First Amendment? Second, is the asserted governmental interest substantial? Third, does the regulation directly advance the governmental interest asserted? And, finally, is the regulation more extensive than is necessary to serve that interest? *Central Hudson Gas & Electric*, 447 U.S. at 566.

253. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 668 n.13 (1985) (Brennan, J., concurring in part); *see also Central Hudson Gas & Electric*, 447 U.S. at 571 n.13 (stating, "We have observed that commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it."); *Virginia Pharmacy Bd.*, 425 U.S. at 771-772 n.24 (stating that the attributes of commercial speech "may also make inapplicable the prohibition against prior restraints").

254. *Central Hudson Gas & Elec.*, 447 U.S. at 563 n.5 (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)).

255. *See* Prosser, *supra* note 200, at 389; *see also* RESTATEMENT (SECOND) OF TORTS §§ 652B-652E.

256. *Zacchini*, 433 U.S. at 573 (stating that "'[t]he interest protected' in permitting recovery for placing the plaintiff in a false light 'is clearly that of reputation, with the same overtones of mental distress as in defamation'") (quoting Prosser, *supra* note 200, at 400). *See* Time Inc. v. Hill, 385 U.S. 374 (1967).

taking of other verbal property, can be enjoined without constitutional difficulty.[257]

The tort of intrusion deals with harm caused by harassing conduct rather than the content of expression. Thus, a television camera crew could be enjoined from invading the privacy of private individuals by harassing, hounding, following, intruding, frightening, terrorizing, or ambushing.[258] Similarly, injunctions can be issued to stop picketing that targets an individual's residence: "Courts are justified in drawing a distinction between communication and physical and psychological intimidation, between free speech and harassment."[259]

The last privacy tort, public disclosure of private facts, has sometimes been held to be enjoinable.[260] The most famous case, *Commonwealth v. Wiseman*,[261] involved a documentary, "Titticut Follies," which depicted dangerous conditions at a state institution for the criminally insane and was deemed to invade the inmates' privacy.[262] An injunction prevented the public showing of the film for more than twenty years.[263]

Other courts have held an injunction to prevent disclosure of private facts should be treated as an unconstitutional prior restraint.[264] This

---

257. *See* Prosser, *supra* note 200, at 401-03.

258. Wolfson v. Lewis, 924 F. Supp. 1413, 1432 (E.D. Pa. 1996); *see also* Galella v. Onassis, 353 F. Supp. 196 (S.D. N.Y. 1972), *aff'd in part and rev'd in part*, 487 F.2d 986 (2d Cir. 1973) (involving an injunction requiring photographer to maintain certain distance from Jacqueline Onassis).

259. Hazel A. Landwehr, *Unfriendly Persuasion: Enjoining Residential Picketing*, 43 DUKE L.J. 148, 181 (1993). For cases upholding injunctions against targeted residential picketing, *see, e.g.*, *Murray v. Lawson*, 649 A.2d 1253, 1256 (N.J. 1994); *Lambert v. Williams*, 218 A.D.2d 618, 620 (N.Y. App. Div. 1995); *Kaplan v. Prolife Action League*, 431 S.E.2d 828, 831 (N.C. Ct. App. 1993); *Northeast Women's Ctr., Inc. v. McMonagle*, 745 F. Supp. 1082, 1090 (E.D. Pa. 1990), *modified*, 749 F. Supp. 695 (E.D. Pa. 1990), *aff'd*, 939 F.2d 57 (3d Cir. 1991); *Boffard v. Barnes*, 591 A.2d 699, 700 (N.J. Super. Ct. Ch. Div. 1991); *Dayton Women's Health Ctr. v. Enix*, 589 N.E.2d 121, 127 (Ohio Ct. App. 1991); *Klebanoff v. McMonagle*, 552 A.2d 677, 678-81 (Pa. Super. Ct. 1988).

260. A few injunctions have been issued to prevent disclosure of private facts, but the Supreme Court has not ruled on their constitutionality. *See, e.g.*, Commonwealth v. Wiseman, 249 N.E.2d 610 (Mass. 1969); Spahn v. Julian Messner, Inc., 233 N.E.2d 840 (N.Y. 1967), prob. jur. noted, 393 U.S. 818 (1968), removed from docket after parties settled, 393 U.S. 1046 (1969); Doe v. Roe, 42 A.D.2d 559 (N.Y. App. Div. 1973), *aff'd*, 307 N.E.2d 823 (N.Y. 1973).

261. 249 N.E.2d 610 (Mass. 1969).

262. *Id.* at 615.

263. An alternate ground for the injunction was that the filmmaker violated his contractual commitment to receive valid releases from all subjects portrayed in the film. *Id.* at 616.

264. *See* Georgia Gazette Publ'g Co. v. Ramsey, 248 Ga. 528, 530, 284 S.E.2d 386, 387 (1981); Quinn v. Johnson, 51 A.D.2d 391, 392-93 (N.Y. App. Div. 1976).

argument is probably the stronger because the harms caused by the disclosure of private facts and those caused by defamatory statements are very similar. Both kinds of harm emanate solely from the content of the speech. As the Supreme Court has stated, the purpose behind actions both for defamation and for false light privacy is nonpecuniary but instead focuses on protecting feelings or reputation.[265] Moreover, cases like *Wiseman* and *Near* illustrate these injunctions pose a serious harm to freedom of speech when they restrict the discussion of important public issues.

B. Exceptions to the Prior Restraint Doctrine

Even with the above exclusions, there will be a few instances when a true prior restraint may be constitutional. The two primary areas involve national security and obscenity. As always, to preserve the principles and history supporting the prior restraint doctrine, these exceptions must be carefully circumscribed.

1. The Certainties of War. A democracy must be willing to accept the real dangers caused by speech even in war-time. As Justice Brandeis explained, those who began our country were not "cowards" who "exalt[ed] order at the cost of liberty."[266] Rather, they were willing to accept the dangers from free speech unless the evil feared was "imminent."[267] Accordingly, even the likelihood of grave harm is not sufficient to permit a prior restraint; the Government must prove disclosure will "surely result in direct, immediate, and irreparable damage to our Nation or its people."[268]

However, no country need accept the certain death of its soldiers. If a broadcaster revealed the location and timing of the landing by American troops during the Gulf War, it is an absolute certainty many of them would have been killed. This is not mere speculation—it is a self-evident reality of war.

Thus, the *Near* exception, permitting prior restraints on "the publication of the sailing dates of transports or the number and location of troops,"[269] has a narrowly focused scope. It applies only when the release of the information must inevitably cause these catastrophic harms.[270]

---

265. *Zacchini*, 433 U.S. at 576.
266. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).
267. *Id.*
268. *New York Times Co.*, 403 U.S. at 730 (Stewart, J., concurring).
269. *Near*, 283 U.S. at 716.
270. *See, e.g., New York Times Co.*, 403 U.S. at 726 (Brennan, J., concurring).

By neglecting to demand this proof, the court that banned *The Progressive* magazine's instructions on how to make a hydrogen bomb erroneously issued a prior restraint.[271] Citing the "risk of thermonuclear proliferation," the judge enjoined publication of the article.[272] He stated that while "[a] mistake in ruling against The Progressive will seriously infringe cherished First Amendment rights, . . . [a] mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all."[273] The error here comes from the court's reliance on a simplistic comparison between the severity of harms potentially caused by the two "mistakes." If this were indeed the appropriate constitutional inquiry, even the most speculative claims of national security would always prevail over free speech interests.[274]

The First Amendment requires courts to use the equation first suggested by Judge Learned Hand, determining whether "the gravity of the 'evil,' *discounted by its improbability*, justifies such invasion of free speech as is necessary to avoid the danger."[275] In other words, it is not simply the harm from erroneously ruling against the Government that courts must consider but its improbability. Thus, the court should never have issued the injunction without proof the harm would surely result.

The injunction against *The Progressive* was lifted after other publications began disseminating the "instructions" contained in the article. Subsequent events have proven thermonuclear annihilation was not the inevitable result of publishing the information. The *Progressive* case should stand as a warning to those seeking an expansive reading of the war-time exception to prior restraints.

2. The Special Case of Obscenity. Of all the exceptions to the ban on prior restraints listed in *Near*, none has resulted in more litigation than obscenity. Likewise, none has resulted in the issuance of more restraints.

---

271. United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wisc. 1979). The article was entitled, "The H-Bomb Secret How We Got It, Why We're Telling It."

272. *Id.* at 995.

273. *Id.* at 996. He added that "In that event, our right to life is extinguished and the right to publish becomes moot." *Id.*

274. Indeed, the judge issuing the injunction opined that "[f]aced with a stark choice between upholding the right to continued life and the right to freedom of the press, most jurists would have no difficulty in opting for the chance to continue to breathe and function as they work to achieve perfect freedom of expression." *Id.* at 995.

275. United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951) (emphasis added). The Supreme Court relied on this formula in *Nebraska Press Ass'n*, 427 U.S. at 562.

Near described, as one of the few "exceptional cases" for which prior restraints were permitted, "the primary requirements of decency . . . against obscene publications."[276] The Court did not cite any case for this exception nor why the harms from obscenity were different from many of the other harms stemming from speech that was not enjoinable.

A review of the history of prior restraint reveals the English concept of "obscene libel" was indeed treated differently from both personal libel and seditious libel. For example, in the 1720 case of *Burnett v. Chetwood*,[277] the Court announced it was "proper to grant an injunction to . . . restrain the printing or publishing [of] any[thing] that contained reflections on religion or morality."[278]

Blackstone as well seems to imply such a distinction in his famous discussion of prior restraints. Blackstone began by noting that libels, "taken in their largest and most extensive sense, signify any writings, pictures, or the like, of an immoral or illegal tendency."[279] He then, however, excluded obscene libels: "[I]n the sense under which we are now to consider them, [libels] are malicious defamations of any person, and especially any magistrate, made public . . . in order to provoke him to wrath or expose him to public hatred, contempt, and ridicule."[280]

Thus, the modern obscenity exception can certainly be justified as reflecting the historically different treatment of "immoral" speech. This is surely a safer distinction than the one suggested by Justice Brennan in the *Pentagon Papers* case, which "rest[ed] upon the proposition that 'obscenity is not protected by the freedoms of speech and press.'"[281] The primary problem with Brennan's formulation is "[a] particular communication cannot be authoritatively called protected or unprotected at a point when, by definition, no court has yet determined the constitutional question."[282] Moreover, much speech for which injunctions have been rejected is "not protected."[283]

---

276. *Near*, 283 U.S. at 716.

277. Burnett v. Chetwood, 35 Eng. Rep. 1008 (1720) (Lord Chancellor Macclesfield), *noted in* Souththey v. Sherwood, 2 Mer. 435, 441 (1817).

278. *Burnett*, 35 Eng. Rep. at 1009.

279. BLACKSTONE, *supra* note 30, at 150.

280. *Id.*

281. *New York Times Co.*, 403 U.S. at 727 (Brennan, J., concurring) (quoting Roth v. United States, 354 U.S. 476, 481 (1957)); *see also Nebraska Press Ass'n*, 427 U.S. at 590 (Brennan, J., concurring) (stating the obscenity and incitement exceptions "have since come to be interpreted as situations in which the 'speech' involved is not encompassed within the meaning of the First Amendment").

282. TRIBE, *supra* note 13, at 1047.

283. *See, e.g.*, Gertz v. Robert Welch Inc., 418 U.S. 323, 340 (1974) (stating that "there is no constitutional value in false statements of fact").

Likewise, justification for the obscenity exception cannot be grounded in the harm that obscenity may cause. It would surely be impossible to compare the relative harms caused by obscenity as compared to those of libel, invasions of privacy, or risk of impairment of a fair trial.

The current situation is to treat obscenity, for purposes of prior restraints, as *sui generis*.[284] Even then, the Court has mandated a full array of procedural safeguards "to protect against any restraint of speech that does come within the ambit of the First Amendment."[285] Based on the history of prior restraint in this area and the weight of Supreme Court precedent, this may be the most appropriate solution.

IV. THE CONTINUING NEED FOR THE PRIOR RESTRAINT DOCTRINE

It has become virtually a constitutional cliché to declare "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."[286] Yet, the unique evils of prior restraints are not so self-evident that they can be taken for granted.

For the prior restraint doctrine to be understood as serving a significant constitutional function, the issue is not simply whether a particular restraint harms free speech. The primary inquiry must be of a comparative nature, asking whether prior restraints, such as licensing systems and injunctions, are really "significantly more burdensome" on free speech than subsequent punishments.[287] Professors Thomas Emerson and Vincent Blasi have led the way in detailing the special vices of prior restraint.[288] In this section, I will attempt to build on

---

284. *See, e.g.*, Sanders v. Georgia, 231 Ga. 608, 612, 203 S.E.2d 153, 156 (1974) ("Free expression is rooted deeply in our way of life and cannot be suppressed through statutes which compromise the exercise of this freedom. This does not mean that one is free to express obscenity. Injunctive procedures are available to stop obscene expressions.").

285. *Nebraska Press Ass'n*, 427 U.S. at 591 (Brennan, J., concurring). For a discussion of these protections, see *supra* text accompanying notes 78-82.

286. *Nebraska Press Ass'n*, 427 U.S. at 559.

287. Blasi, *supra* note 5, at 26. In 1981 Professor Blasi argued that because the criminal contempt trial is "substantially similar" to criminal prosecution, the procedures used for penalizing violators of injunctions "cannot be the basis for linking injunctions with licensing systems." *Id.* at 23. With subsequent cases such as *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994), criminal contempt proceedings more and more resemble criminal prosecutions. Among the common provisions are a ban on double jeopardy; rights to receive notice of charges, assistance of counsel, and summary process and to present a defense; the privilege against self-incrimination; the right to proof beyond a reasonable doubt; and, for criminal contempts involving imprisonment of more than six months, the right to jury trial. Thus, the special nature of contempt proceedings is no longer the strongest argument against prior restraints.

288. *See* Emerson, *supra* note 10, at 648; Blasi, *supra* note 5.

their work to catalog the major reasons the barriers against prior restraint must remain forever high.[289]

A. Altering the Outcome

One of the questions raised by those skeptical of the prior restraint doctrine is whether any of the great First Amendment victories would have been lost but for the prior restraint doctrine. For example, *Near* itself easily could have been decided on overbreadth grounds; the Minnesota law prohibiting the publishing of a "malicious, scandalous or defamatory newspaper,"[290] obviously banned much constitutionally protected speech.

For the prior restraint doctrine to matter, in the words of Professor Jeffries, courts must identify the "testing case," that is, an instance "in which speech is concededly . . . outside the substantive protection of the First Amendment but assertedly within the ban of prior restraint."[291] Although there are numerous significant nonsubstantive aspects to the way courts deal with prior restraints that are worthy of special protection,[292] it is worthwhile to recognize those cases in which the outcome is altered because the restriction is labeled a prior restraint.

The most common case in which the ban on prior restraint protects "unprotected" speech is the prohibition on enjoining defamatory statements. Despite the arguments of those who assert the equitable limitation on injunctive relief is outdated,[293] the constitutional prohibition has prevented injunctive relief from being awarded to successful defamation plaintiffs. This prohibition of injunctive relief furthers First Amendment goals because it prevents judges from assuming a censorial role over the future speech of those previously found to have uttered a libelous statement. Such a speaker would never be sure whether further

---

289. Because I am focusing on prior restraints in general, I will not discuss in detail one concern limited to administrative prior restraints: the effect of a censor's personality and job description on the restriction of free speech. *See, e.g.*, Redish, *supra* note 8, at 76-77 ("Nonjudicial administrative regulators of expression exist for the sole purpose of regulating; this is their raison d'etre. They simultaneously perform the functions of prosecutor and adjudicator and, if only subconsciously, will likely feel the obligation to justify their existence by finding some expression constitutionally subject to regulation."); Emerson, *supra* note 10, at 658 ("No adequate study seems to have been made of the psychology of licensers, censors, security officials, and their kind, but common experience is sufficient to show that their attitudes, drives, emotions, and impulses all tend to carry them to excesses.").

290. *Near*, 283 U.S. at 712.

291. Jeffries, *supra* note 5, at 411.

292. *Id.* at 416.

293. *See generally* Roscoe Pound, *Equitable Relief Against Defamation*, 29 HARV. L. REV 640 (1916).

comment on the previous controversy would violate an injunction and might well choose to avoid discussion altogether.

Moreover, injunctive relief would permit plaintiffs who suffer no economic damage to prevail in cases when they otherwise would have received only nominal damage, if the cases would have been brought at all. The opportunity to silence an opponent would encourage more libel litigation and expand the tort from one limited to protecting reputation to one in which judges are invited to determine which combatant in a public controversy they believe is telling the truth. Thus, injunctive relief generally is unavailable for libel plaintiffs, even those seeking to silence statements previously adjudged to be libelous.

A related area in which "unprotected" speech cannot be enjoined concerns invasions of privacy.[294] As with defamation, invasions of privacy are properly actionable in suits for damages, but enabling judges to silence speakers would create the possibility of limiting discussion of important public issues and would permit the prospect of potential harm to overwhelm the carefully created limits of the cause of action.

Another "testing case" in which the protections of the prior restraint doctrine were essential for the protections of the First Amendment was the *Pentagon Papers* case. Even though it could be argued the Government never proved the need for any relief against the newspapers, it is undeniable that two of the six justices making up the majority, Justices White and Stewart, ruled against the Government "only because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system."[295] As they both clearly implied they would support subsequent punishment against the newspapers,[296] adding their votes to the three already in favor of the Government's position would have spelled defeat for the newspapers.

Finally, even though not precisely within the earlier definition of the "testing case," the procedural protections the Court has included in the prior restraint doctrine must be acknowledged. By placing the burdens on the Government, not only of proof but of obtaining speedy judicial review, the Court has prevented much protected speech from being silenced along with unprotected speech. Whether these "sensitive tools" would have been mandated but for the prior restraint doctrine is

---

294. *See, e.g.*, Georgia Gazette Publ'g Co. v. Ramsey, 248 Ga. 528, 284 S.E.2d 386 (1981); Quinn v. Johnson, 381 N.Y.S.2d 875 (App. Div. 1976). *Contra* Commonwealth v. Wiseman, 249 N.E.2d 610 (Mass. 1969).

295. *New York Times Co.*, 403 U.S. at 730-31 (White, J., concurring).

296. *See id.* at 737 (stating, "I would have no difficulty in sustaining convictions . . . on facts that would not justify the intervention of equity and the imposition of a prior restraint.").

unknown.[297] But it was the specter of the licensor that motivated the Court. Accordingly, even though "unprotected" speech, such as obscenity, can be attacked either through a prior restraint or subsequent punishment, the procedural safeguards of the prior restraint doctrine have proven to be an invaluable means of protecting "protected" speech.

B. Restraining the Censor

One of the concerns with both licensing schemes and injunctions is the ease with which the censorial decision can be made, enabling an overly enthusiastic or biased decision-maker to go unchecked. As Professor Emerson wrote, "A government official thinks longer and harder before deciding to undertake the serious task of subsequent punishment-the expenditure of time, funds, energy, and personnel that will be necessary. Under a system of prior restraints, he can reach the result by a simple stroke of the pen."[298]

Not only does the ease of issuing a prior restraint encourage the issuance of restraints, some have argued knowledge that one's speech can be silenced so easily by a government official will lead to excessive self-censorship. However, as Professor Blasi pointed out, this is not an exclusive property of prior restraints because fear of governmental bias "can also cause self-censorship under the subsequent punishment regimes."[299]

Nonetheless, prior restraints do pose a unique danger regarding both ease of issuance and governmental bias. This danger is best understood by reference to separation of powers principles. Government officials from any branch are always capable of feeling biased against a particular speaker, and any law, be it prior restraint or subsequent punishment, infringes freedom of speech when it permits officials to act on their biases. The genius behind separating powers, though, is that more than one official must feel this bias before a speaker is penalized. It is possible that all three branches of government will want to silence a particular point of view and no system of government could prevent this occurrence. Fortunately, these moments are far rarer than the cases of the petty tyrant, the angry city council, or the prejudiced judge. Requiring more than one branch to act is not a perfect safeguard, but it is a significant one.

Similarly, the separation of powers principle also counteracts the "stroke of the pen" scenario. A potential censor knows more than one

---

297. *See generally Speiser*, 357 U.S. at 525.
298. *See* Emerson, *supra* note 10, at 657.
299. Blasi, *supra* note 5, at 35.

step is needed and there is always a possibility the other branches will not share the prejudice or enthusiasm of the censor. Thus, "a decision to suppress in advance is usually more readily reached, on the same facts, than a decision to punish after the event."[300]

C. *Personalization and Equal Protection*

A related harm from prior restraints is the personalized nature of the governmental action. Not only does this increase the likelihood of self-censorship, but it permits encroachments on equal protection principles.

Unlike subsequent punishments, which begin with laws or regulations applicable to all potential speakers, prior restraints, whether by license or injunction, identify the individual speaker prior to the speech. The personalization inherent in any system of prior restraints gives the government the ability to violate the equal protection norm inherent in the First Amendment.[301] This norm requires equal treatment for all speakers, regardless of the content of their messages.[302] Subsequent punishments can be imposed based only on violations of laws of general applicability. Prior restraints, by contrast, can be imposed specifically on disfavored individuals.

Moreover, it is often impossible to prove a prior restraint system is being operated in a discriminatory fashion. With such a system, "*post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression."[303]

Permitting judges to impose injunctions on speech creates the same possibility of unprovable suppression of unfavorable expression. Under such a system, "speech may be quashed, or not quashed, in the discretion

---

300. Emerson, *supra* note 10, at 657.

301. *See generally* Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1976); *see also* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972) (striking down on equal protection grounds a ban on picketing that exempted labor picketing because the government "may not select which issues are worth discussing or debating in public facilities"); Carey v. Brown, 447 U.S. 455, 459 (1980) (striking down a law that "selectively proscrib[ed] peaceful picketing on the basis of the placard's message").

302. *See, e.g.*, Adderley v. Florida, 385 U.S. 39, 47 (1966) (permitting trespass conviction for demonstration outside jail because "[t]here is no evidence at all that on any other occasion had similarly large groups of the public been permitted to gather on this portion of the jail grounds for any purpose").

303. *City of Lakewood*, 486 U.S. at 758.

of a single official, who necessarily knows the content and viewpoint of the speech subject to the injunction."[304]

Whether phrased as a ban on content-based regulation or a guarantee of equal protection, freedom of expression requires that speakers be treated similarly, regardless of viewpoint. Because any system of prior restraint makes discriminatory treatment both easy to impose and difficult to detect, "'the danger of censorship and of abridgment of our precious First Amendment freedoms is too great' to be permitted."[305]

D. The Collateral Bar Rule and the Cost of Delay

One of the most pernicious features of injunctions against speech is the collateral bar rule. Unlike a law, which can be violated and still be challenged as unconstitutional, an unconstitutional injunction must be obeyed until overturned by an appellate court.

In *Walker v. City of Birmingham*,[306] the Supreme Court upheld a finding of contempt against civil rights demonstrators who disobeyed an injunction barring them from marching without permission.[307] Even though the law under which the injunction was granted was later found to be unconstitutional, the Court stated the demonstrators had no right to ignore the injunction.[308] As the Court has since remarked, "persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order."[309]

Under the collateral bar rule, an improper injunction against speech will have one of two immediate results: either it will be obeyed, and protected speech will be silenced during the time of appeal, or it will be violated, and the speaker will be punished for uttering protected

---

304. Lawson v. Murray, 515 U.S. 1110, 1114 (1995), *denial of cert.* (Scalia, J., concurring). Justice Scalia argued that an injunction on peaceful residential picketing by anti-abortion protesters should be struck down as an unconstitutional prior restraint, especially because "[t]he New Jersey courts have given equitable relief against residential picketing not violative of state law only in this case and another recent case involving abortion protestors." *Id.* at 1111, 1114.

305. Forsyth County v. Nationalist Movement, 505 U.S. 123, 131 (1992) (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975)).

306. 388 U.S. 307 (1967).

307. *Id.* at 320-21.

308. *Id.* at 317-21.

309. GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375, 386 (1980); *see also* Howat v. Kansas, 258 U.S. 181, 189-90 (1922) (stating an injunction must be obeyed "however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming, but void law going to the merits of the case").

speech.[310] This problem was summarized by Alexander Bickel with the aphorism, "where a criminal statute chills, prior restraint freezes."[311] This is an intolerable situation many have recognized as a fundamental evil of injunctions against speech.[312]

In fact, in many ways, contempt prosecutions for violating injunctions are eerily similar to the seditious libel trial of John Peter Zenger. In both, the only question is whether the speech was uttered in violation of governmental edict. The propriety of the edict itself must remain above questioning.

The only safe recourse is to obey the injunction and be silenced.[313] Due to this delay, the speech either "never reaches the marketplace at all" or "may have become obsolete or unprofitable."[314] It is certainly true not all delays will be significant.[315] But, it is even more true that government cannot be trusted to determine the importance of the timeliness of any particular item of news.[316]

Some lower courts have held that a "transparently invalid" injunction can be ignored and then challenged.[317] The Supreme Court, though, has never utilized this exception to permit a violated injunction to be challenged. Moreover, the upholding of the injunction in the *Noriega*

---

310. As Professor Blasi noted, "Enjoined speakers must hold their tongues while they move to have the injunction vacated or modified." Blasi, *supra* note 5, at 32.

311. ALEXANDER BICKEL, THE MORALITY OF CONSENT 61 (1975).

312. Redish, *supra* note 8, at 93-99. Other prominent scholars who have discussed the harms caused by the collateral bar rule include Professors Owen M. Fiss and Stephen Barnett. *See, e.g.*, CIVIL RIGHTS INJUNCTION 30, Indiana Univ. Press (1978); Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 553 (1977).

313. The power of an injunction can be seen in its effectiveness. The *New York Times* and *The Washington Post* delayed their publication of the Pentagon Papers, and *The Progressive* magazine withheld publication of the H-bomb story.

314. *See* Emerson, *supra* note 10, at 657. As the Court described in Bridges v. California, 314 U.S. 252 (1941), the practical effect of judicial restrictions on the discussion of a trial would be that "anyone who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted." *Id.* at 269.

315. *See, e.g.*, Blasi, *supra* note 5, at 66 (stating that "the costs of delay are highly variable, and should not be uncritically assumed").

316. *Nebraska Press*, 427 U.S. at 561. As the Supreme Court recognized, albeit in an understated way, "the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly." *Id.*

317. *Providence Journal Co.*, 820 F.2d 1342, 1344 (1986) *modified on reh'g by* 820 F.2d 1354 (1st Cir. 1986).

case should make one wonder whether even the most outrageous injunction is "transparently invalid."[318]

E. Abstract Facts and Speculative Harms

To Professor Blasi, one of the most harmful aspects of a prior restraint is it required "adjudication in the abstract."[319] Whether it be by injunction or permit denial, the decision to impose a prior restraint is made before the communication occurs. Thus, any evaluation of the harms associated with particular speech "must be made in the abstract, based on speculation or generalizations embodied in presumptions."[320]

This is indeed a serious problem. Risk-adverse judges or licensors are apt to err on the side of caution, not on the side of free speech.[321] After all, if a speaker is silenced, it is impossible to prove no harm would have resulted. If speech is permitted and trouble ensues, all know at whom to point the finger of blame.

Another aspect of the speculation problem is the judge or licensor often must speculate over what the speaker will actually say. As the Court has noted, "It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable."[322]

By contrast, subsequent punishments can be imposed only after the speech is communicated. Not only does this allow a far more accurate assessment of whether the speech was truly dangerous, it permits the public to protect the speaker who was truly effective.[323] As has been true since colonial times, when the Government seeks to punish the most effective speakers, it runs the risk that the people will see this as punishment for eloquence, not criminality.

---

318. The Court in *Walker*, in upholding the finding of contempt, stated that "this is not a case where the injunction was transparently invalid or had only a frivolous pretense to validity." *Walker*, 388 U.S. at 315. The Supreme Court has yet to find such a case. For a discussion of the *Noriega* case, see *supra* text accompanying notes 62-68.

319. Blasi, *supra* note 5, at 49.

320. *Id.*

321. *See generally id.* at 52 (stating that "judges tend to be unduly risk-adverse").

322. *Southeastern Promotions Ltd.*, 420 U.S. at 559. In *Southeastern Promotions*, the musical "Hair" was barred from a municipal theater, even though "neither the [licensing] Board nor the lower courts could have known precisely the extent of nudity or simulated sex in the musical, or even that either would appear, before the play was actually performed." *Id.* at 561.

323. As Professor Blasi argued, "On balance, speakers who prove to be persuasive and attractive are likely to fare better as a result of the dynamics of subsequent punishment." Blasi, *supra* note 5, at 53.

F. *Aesthetics and Prior Restraint*

Another problem with prior restraint is less in its direct impact on speech than in what might be called its aesthetic harm. The principle that a free government should not stop its citizens from expressing their opinions is a core value for Americans. To permit such restrictions, in the words of one commentator, would be to miss "the music of the First Amendment and of the doctrine against prior restraint."[324]

Professor Emerson saw this problem in almost spiritual terms. He wrote that a system of prior restraint "implies a . . . willingness to conform to official opinion and a sluggishness or timidity in asserting rights that bodes ill for a spirited and healthy expression of unorthodox and unaccepted opinion."[325]

Professor Blasi similarly asserted that a philosophy permitting prior restraints was based on unacceptable premises.[326] Prior restraints, for example, imply "that the activity of disseminating controversial communications is abnormally hazardous or disruptive, and hence represents a threat to, rather than an integral feature of, the social order."[327] Additionally, "to trust the censor more than the audience is to alter the relationship between the state and citizen that is central to the philosophy of limited government."[328]

The aesthetic argument is based on neither legal precedent nor detailed history. Nonetheless, it reflects the intangible value derived from being able to declare that in our country we fear censors more than speech and trust the people more than the government. It makes one just a little prouder to know that we do not do prior restraints.

G. *The Framers' Intent and the Benefits of an Easy Case*

Even among those who argue most strenuously for the importance of preserving the prior restraint doctrine, there is one final significant benefit that is usually overlooked. Because the protection against prior restraint is not merely essential for free expression but was so understood by the framers of the Constitution, the prior restraint doctrine has the effect of producing easy cases for hard times.[329]

---

324. Steven Helle, *Prior Restraint By the Backdoor: Conditional Rights*, 39 VILL. L. REV. 817, 874 (1994).

325. Emerson, *supra* note 10, at 659.

326. Blasi, *supra* note 5, at 85.

327. *Id.*

328. *Id.* at 73.

329. I have adopted the concept of "easy cases" from Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985).

First Amendment cases can be difficult for a variety of reasons. Sometimes, a new means of communication presents novel problems that have not been previously addressed.[330] Other times, there will be disagreement over the value of specific expression[331] or the importance of competing values threatened by the expression.[332] Additional problems arise with new approaches either of regulating speech or of dealing with the noncommunicative aspect of expressive conduct.[333]

But issues of prior restraints are simple. As the Supreme Court has stated, "[W]hen we do have evidence that a particular law would have offended the Framers, we have not hesitated to invalidate it on that ground alone."[334] There is, in fact, universal agreement that prior restraints would have deeply offended the Framers and that one of the major objectives of the First Amendment was "to prevent all such *previous restraints* upon publications as had been practiced by other governments."[335] Thus, we can declare with confidence that "the Framers in 1791 believed [freedom from prior restraint] sufficiently valuable to deserve the protection of the Bill of Rights."[336]

What this confidence provides is the rare potential for an easy case. Speakers, lawyers, and judges can all know it is fundamentally un-American to judge speech before it is given, whether by discretionary license or injunction.

---

330. *See, e.g.*, Reno v. ACLU, 521 U.S. 844 (1997) (internet); Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (broadcasting); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (movies); Kovacs v. Cooper, 336 U.S. 77 (1949) (loud speakers).

331. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (commercial speech); FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (indecency).

332. *See, e.g.*, Gertz v. Welch, 418 U.S. 323 (1974) (reputation of a private figure); Texas v. Johnson, 491 U.S. 397 (1989) (preservation of flag as symbol of national unity).

333. *See, e.g.*, Alexander v. United States, 509 U.S. 544 (1993) (forfeiture of assets of bookstore); Buckley v. Valeo, 425 U.S. 946 (1976) (campaign spending as speech); United States v. O'Brien, 391 U.S. 367 (1968) (outlawing the burning of draft cards).

334. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 584 n.6 (1983).

335. Patterson v. Colorado, 205 U.S. 454, 462 (1907). *See Minneapolis Star & Tribune Co.*, 460 U.S. at 584 n.6 ("Prior restraints, for instance, clearly strike to the core of the Framers' concerns, leading this Court to treat them as particularly suspect.").

336. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 370 (1995) (Thomas, J., concurring). Justices Thomas and Scalia share the view that the First Amendment should be interpreted based on "the intent of those who drafted and ratified it."). *Id.*; *see also id.* at 372 (Scalia, J., dissenting) (stating that "the Constitution bears its original meaning and is unchanging"). This view has not been accepted by a majority of the Court, which will "ordinarily simply apply those general principles [of free speech], requiring the government to justify any burdens on First Amendment rights by showing that they are necessary to achieve a legitimate overriding governmental interest." *Minneapolis Star & Tribune*, 460 U.S. at 583 n.6.

The temptation to regulate opposition speech can strike any government. In turbulent times, the desire to suppress can combine with the legitimate interest in preserving the peace to induce those with power to attempt to silence potentially offending speech. A clear, understandable prior restraint doctrine, with its impeccable historical lineage and simple directive that government officials must permit speech to be communicated, will both deter attempts to impose censorship and permit courts to halt, quickly and efficiently, any such attempt before it works its irremediable harm.

V. CONCLUSION

While the Supreme Court constitutionalized the doctrine of prior restraint since *Near*, it failed to provide a working definition of the term. Such a definition is not possible, though, without incorporating the concept of separation of powers. Because the problem of prior restraint can be caused by different branches of government, the differing natures of each branch must be considered as well.

With this more complete view of the meaning of prior restraint, it becomes clear that the Supreme Court was correct in *Near* when it held an injunction against speech should be treated as a prior restraint.[337] Further, this study reveals the real reasons some restraints should be treated as exclusions from or exceptions to the prior restraint doctrine. With a usable definition of prior restraints finally in place, the future of the First Amendment can include the lessons of what has gone before: "The favorite idea in England and America has been that every person may freely publish what it sees fit, and any judgment of the law upon it shall be reserved til afterwards."[338]

337. *Near*, 283 U.S. at 713.

338. State ex. rel Liversey v. Judge of Civil Dist. Ct., 34 La. Ann. 741, 743 (La. 1882) (quoting ABBOTS LAW DICTIONARY "Liberty of the Press").

* * *